LEGISLATIVE HEARING ON THE "VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008"

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

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LEGISLATIVE HEARING ON THE "VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008"

THURSDAY, APRIL 10, 2008

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON DISABILITY ASSISTANCE
AND MEMORIAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in Room 334, Cannon House Office Building, Hon. John Hall [Chairman of the Subcommittee presiding].

Present: Representatives Hall, Rodriguez, Hare, Lamborn, and Bilirakis.

OPENING STATEMENT OF CHAIRMAN HALL

Mr. HALL. Good afternoon. The Veterans' Affairs Disability Assistance and Memorial Affairs Subcommittee hearing on the "Veterans Disability Benefits Claims Modernization Act of 2008" will come to order.

I would ask everyone to rise for the Pledge of Allegiance. Flags are located in the front and the rear of the room.

[Pledge of Allegiance.]

Mr. HALL. Thank you. I am proud to be here today and that you have all joined us, and I am honored by your presence and to be joined by Ranking Member Lamborn in a bipartisan effort to present this historic legislation to reform the U.S. Department of Veterans Affairs (VA) Benefits Claims Processing System.

This is in no way a unilateral effort. Several of the contained provisions within this legislation were derived from independent bills offered by Members of this Committee on both sides of the aisle.

I am confident that when it is voted on, it will leave this Committee as a seamless, fluid piece of legislation that will grant the wounded warriors of this great country the service they deserve.

I once read, "Veterans' programs are not perfect. Much remains to be done by way of improvements along forward-looking and constructive lines. The dominant problems are the carryover from past decades of a backward-looking pension philosophy and our failure to adjust the existing veterans' programs to fundamental changes in our society."

I found this quote to be striking as it also captures my observations of the Veterans Benefits Administration (VBA). Yet, unfortunately, those observations were made by Omar Bradley in 1956.

We should have listened to the General then, but it is imperative that we do it now, especially since we have our troops in harm's way around the world.

The Subcommittee has conducted extensive oversight during this Congress and listened to the testimony of disabled veterans and their families and survivors who explained their problems with VA benefits.

Many of their concerns led back to issues with claims processing delays, denials, and avoidable remands. For a moment, I want to reflect on what they said since these are the very people at the heart of this bill.

We have heard from a paralyzed veteran who went a year without compensation because of lost files and poor communication with VA. This put his family in dire financial stress and forced his children to drop out of college.

There were parents who talked to us about suicide and mental health problems and the inability of their beloved child to get VA healthcare. In many cases, service connection is necessary to accessing that care.

Another veteran who suffered a traumatic brain injury and an amputation along with his wife confronted us on how exhausting it is to figure out VA benefits and the gaps that exist because the model is outdated and archaic even for a case that is so obviously clear-cut and simple. It does not account for the loss in their quality of life or for their real-world needs.

These unfortunate occurrences are not just affecting veterans from current wars. They affect veterans of every age and from every conflict.

I heard a story of a World War II veteran at a meeting last week in New York, who had a mortar shell that landed directly in front of his face. We heard this gentleman recalling the medic who attended him at the battlefield and his difficulty in telling the difference between his burns and his beard.

After being taken to a medical facility, he learned that this incident had never been reported by the medic. As a result, this brave soldier who served his Nation in time of dire need had to fight the VA for 51 years before being awarded his benefits due to the requirements of finding witnesses of the event. The burden of proof, while statutorily sound, as interpreted by VA is all too often impossible or extremely difficult for veterans to understand and to complete.

As he stood and told me this story, I watched as he grasped a folder that contained his disability claim and heard him state that he would never let it go in fear that the VA would rescind his claim and take back his money.

For too long, VBA has been allowed to skirt their responsibility to reward our veterans with the same type of selfless, heroic service that veterans themselves gave to our country. However, reciprocity is at hand.

The Veterans Disability Benefits Commission, Dole-Shalala Commission, and many other task forces have made recommendations

to improve the system. We have data from the Institute of Medicine, the Center for Naval Analyses, the Institute of Defense Analyses, and several U.S. Government Accountability Offices (GAO), and Inspector General (IG) reports that highlight inconsistencies, variances, disparities, errors numerous areas within the claims processing system in dire need of reform and modernization.

The Veterans Service Organizations (VSO) have shared their ideas and experiences to reform the VBA and have played an integral part in shaping this legislation.

Expert medical, legal, and technological witnesses enlightened us on what is possible in our modern world. VA employees have also worked with us to tackle these problems and there is no doubt that this is a workforce dedicated to assisting disabled veterans.

Unfortunately, VA employees work in a broken, outdated environment. So I am grateful for them and everyone else who has been willing to work with us on developing the improvements this legislation seeks to advance.

With the "Veterans Disability Benefits Claims Modernization Act of 2008," we hope to address the central issues that have led to the enormous and mounting claims backlog, delays in processing, avoidable errors, inconsistencies in ratings, and lack of accountability that amounts to a system of injustice, at least as perceived by many of our veterans.

The provisions of Title I of this bill encapsulate several systemic issues that address evidence problems with post traumatic stress disorder claims (PTSD), as well as requiring the VA to study, report, and implement a plan for readjusting the VA's schedule for rating disabilities so that it includes medically recognized standards, codes, and practices, and appropriate compensation for the average loss of earnings capacity, quality of life impacts, mental health parity, encouragements for vocational rehabilitation, and creation of an Advisory Committee on Disability Compensation.

Title I would also revamp the VBA work credit and management systems; require certification and training for VBA employees and managers; assess annually quality assurance, expedite fully developed claims; require a check list provided for evidence necessary to process claims; require a report on employing medical professionals at VBA, assign partial ratings for severely injured veterans while deferring other conditions, enhance information technology that includes a web portal for claims submission and tracking by veterans, that provides rules based, expert systems, and automated decision support; and would allow substitution for veterans who die while claims are pending, allowing qualified loved ones to step into shoes of the veteran and have time to submit and add information.

I would like to thank Ranking Member Lamborn for his contributions to this part of the bill, especially those that would move the VA into the 21st Century in terms of how it handles information rather than the piles of paper with rubber bands and sticky pads on them that we have showcased during previous hearings in our Subcommittee.

Title II of this bill addresses the servicemembers' transition from the U.S. Department of Defense (DoD) to VA, with the creation of a single VA/DoD disability evaluation examination process whereby DoD determines fitness for duty and VA rates the level of severity.

This reduces the duplication for an injured or ill servicemember who must navigate two different systems at a time when they need support and assistance the most.

Title III focuses on matters related to the United States Court of Appeals for Veterans Claims (CAVC). It would establish annual tracking requirements for the Court's workload and gives the Court the authority to affirm, modify, reverse, or vacate, and remand decisions of the Board. The Court must also first decide all assignments of error raised by an appellant for each benefit claimed.

Make no mistake, this is an ambitious landmark piece of legislation which will take a great deal of cooperation and collaboration on multiple fronts. No doubt this will need to be a collective effort that goes well beyond Congress and VA. It will require the support and expertise of the VSOs, DoD, leading experts and professionals, academics, technicians, and other government entities, all of whom bring information and experience to the table.

I know that VA is moving already in the general direction of some of the efforts outlined in this bill and I applaud your efforts in this vein. They are not overlooked.

Also, I do not want to fail to recognize the hard work and dedication of the VA employees throughout the entire VBA, from the Regional Office (RO) to the Central Office. I know that the problems we face today are the result of a culmination of events beyond their control which run the gamut from inadequate funding and poor leadership to a corporate culture that does not foster accountability.

Just as I have heard stories of calamity, I have also heard stories of the care and compassion of VA employees who genuinely care about our veterans and work tirelessly to provide them with every service they can.

But today, time is of the essence and we must stop the incomprehensible cycle of ignoring the lack of accountability for outcomes of claims at the VBA. Outcomes matter, not just process. I repeat, outcomes matter, not just process. And I believe that we need to modernize our Nation's claims processing system to make it accountable and produce better outcomes for our veterans, their families, and survivors.

Ladies and gentlemen, the time has come when we must envision a VA of the future and not leave Omar Bradley's warning unheeded at the expense of another generation of our bravest and finest veterans.

I now yield to Ranking Member Lamborn for his opening statement.

[The prepared statement of Chairman Hall appears on p. 41.]

OPENING STATEMENT OF HON. DOUG LAMBORN

Mr. LAMBORN. Good afternoon and thank you, Chairman Hall. It is an honor to participate in this important occasion.

The "Veterans Disability Benefit Claims Modernization Act of 2008" still has far to go, but for the first time in a long while, I believe there is a proper alignment of thought and a cooperative effort to make substantial improvements to the veterans benefits claims process.

This bipartisan bill consists of a number of measures that have as their foundation the collective recommendations of Democrats, Republicans, Veterans Service Organizations, and two Blue Ribbon Commissions on Veterans Benefits. That is not to say this bill is flawless at this point in time or that there are not remaining snags to be worked out. Indeed, there are a couple of issues that cause me difficulty and one that I believe is critically flawed.

I will elaborate more on these concerns in a bit, but I want to preface those remarks with the fact that I wholeheartedly agree with the intent behind even those provisions. Still, I am deeply concerned about unintended consequences that they may hold.

Principally, I am troubled over the provision that would have VA concede presumption of a stressor for every person who served in theater of operation that was subject to combat. This could have enormous ramifications for the VA claims system and could potentially even increase the backlog.

At the same time, I am sympathetic to what the provision attempts to accomplish. I believe an agreed-upon solution can be reached and I believe the expertise needed to arrive at such a fix is gathered here in this room today.

My other concerns are less significant, but I remain concerned about what might occur if we codify certain regulations and leave less discretion for VA.

I very much look forward to the testimony of our witnesses, including that of the VA.

I hope that based upon recommendations made here, resolutions can be reached and this bill will acquire the momentum it needs to make the potential historic impact that it holds.

Chairman Hall, I appreciate the favorable rapport that we share on this Subcommittee. And, I eagerly anticipate working with you and your staff during the short time left in this session to make some great progress for veterans.

Thank you, and I yield back.

[The prepared statement of Congressman Lamborn appears on p. 43.]

Mr. HALL. Thank you, Congressman Lamborn.

I would like to welcome all of our panelists testifying before the Subcommittee today and remind you that your complete written statements have been made a part of the hearing record.

Please limit your remarks to 5 minutes so that we may have sufficient time to follow-up with questions once everybody has had the opportunity to provide their testimony.

Joining us on our first panel is William P. Greene, the Chief Judge of the U.S. Court of Appeals for Veterans Claims. Hon. William P. Greene, you are now recognized for 5 minutes.

STATEMENT OF HON. WILLIAM P. GREENE, JR., CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Chief Judge GREENE. Good afternoon, Chairman Hall, Ranking Member Lamborn, Mr. Rodriguez, Mr. Hare. Thank you for the introduction and thank you for inviting me to be here today with you.

I took the liberty to bring with me members of my Legislative Committee, Judge Al Lance and Judge Mary Schoelen, who on a

daily basis, are always available to you and your staff to answer questions about the Court.

I am here today to discuss with you the "Veterans Disability Benefits Claims Modernization Act of 2008." I appear today in my capacity as the Chief Administrative Officer of the Court and in the spirit of cooperation between the Legislative Branch and a national court of record.

Almost 20 years ago, the Senate and House Veterans' Affairs Committees of Congress realized the fruits of their labor when President Reagan signed into law the "Veterans Judicial Review Act." That Act established a national court of record, then the United States Court of Veterans Appeals, to provide independent judicial review of adverse decisions by the Department of Veterans Affairs affecting veterans.

Until that time, the VA was the only Federal agency whose decisions were not subject to review by the Judiciary. Since 1988, I believe the decisions and opinions by the Court have had a positive impact on the adjudication of veterans' benefits by unifying and clarifying this new area of the law.

In doing so, the Court has been faithful to the well-established concepts of appellate judicial review for the Federal Judiciary which includes not only the Article 3 courts, but also the Article 1 courts.

Thus, in carrying out the Court's business, we have, as authorized by our enabling statutes, adopted the practices and procedures established under Title 38 of the United States Code and to those laws applicable to courts of the United States. Therefore, for at least the past 18 years, the Court, like all other courts, has maintained statistics concerning the Court's work and has provided that information annually to the public and to Congress.

The proposed legislation appears to codify the Court's practice and seeks two items of information that are not currently provided in the Court's annual report. There is no difficulty whatsoever in acquiring that additional information and surely it could be provided in future annual reports without a need to compel it statutorily as proposed in section 301.

Concerning section 302 of the proposed legislation, I also must state that a litigant before the Court of Appeals for Veterans Claims generally may expect the same practices and procedures experienced in all other Federal courts. However, there can be exceptions because the U.S. Court of Appeals for Veterans Claims is a Court with specialized jurisdiction and, therefore, may have special rules applying to that unique jurisdiction.

The part of section 302, however, that prohibits a government lawyer who appears as an officer of the court from raising a legitimate error that may provide justice to a veteran could create jurisprudential problems that interfere with the Court's ability to perform its expected judicial responsibility.

As stated in my prepared remarks, I leave it to the Secretary of VA and his General Counsel to speak directly to any potential ethical considerations that might arise from such a mandate.

For sure the proposed legislation, if enacted, would add yet another factor to the delay equation that has peaked our collective interests. The Court already experiences thousands of requests to ex-

tend time for the appellant briefs and other documents to be presented to the Court.

For the government to obtain written consent from appellants, many of whom are unrepresented, to raise or concede an error, invites the possibility of even more delay. Surely when Congress created the Court, it intended for justice to be done and for disputes to be resolved fairly and wisely.

That part of section 302 that amends section 7252(a) by requiring the Court to decide all assignments of error raised by an appellant surely will have the effect of slowing down considerably the Court's ability to resolve cases timely.

Simply stated, a guiding principle of appellate judicial review is that when a Court can resolve a case based on a particular issue, it should do so without reaching unnecessary issues. The judges of the U.S. Court of Appeals for Veterans Claims follow that guidance and attempt to do so in every case. Indeed, if 20 issues are raised that lead you to the same result, why visit each of those 20 ways?

I know there has been much discussion and comment about this circumstance, but I submit that if there is a question of law involved or where a ruling or another issue would indeed have a direct impact on how a proceeding would be conducted upon remand, the judges will endeavor to address those issues. If not, the appellant could seek reconsideration or, if viable, appeal to the Federal Circuit.

And it must not be forgotten that although appellants have great faith in their arguments, as they should, they may not always prevail. When the Court decides that the Board of Veterans Appeals has committed a prejudicial error that affects the fairness of the proceedings, leading to a denial of a benefit the remedy is to vacate or set aside that decision and return it to the Board for corrective action. When that is done, the appellant obtains a readjudication and is also afforded the opportunity to provide more evidence and additional argument to include the ones that are related to the arguments on appeal to the Court. In essence, the matter is done all over.

While some may see this as a hamster wheel effect, the reality is that the veteran still gets a fair chance to pursue his or her benefit. Arguments that are related to the cause of the remand necessarily change their impact once there is to be readjudication. Thus, it simply is not necessary to expend judicial time in addressing a matter that will be overcome by the evolving circumstances in the readjudication.

But if the argument is addressed and the Court rules against the veteran, that ruling is binding in the case and the appellant loses the ability to make that argument during the readjudication unless he appeals that ruling to the U.S. Court of Appeals for the Federal Circuit and wins. Of course, to do that will consume even more time.

In short, my statement outlines my concerns about the negative, and I am sure unintended, consequences, of this proposed legislation. Let me simply assure you that the Court is poised to conduct judicial review responsibly and in a manner that will ensure that all appellants not only have their day in court but also will receive a sufficiently fair decision.

Thank you.

[The prepared statement of Chief Judge Greene appears on p. 43.]

Mr. HALL. Thank you, Judge Greene, and thank you for being here today and sharing your expertise and experience with us.

Could you elaborate on how the Court determined what it would place in its annual workload report and do you have any objections to the additions made to your annual report and categories? That is assuming legislation aside, for instance.

Chief Judge GREENE. Right. As indicated, Chairman Hall, the Court, like other U.S. courts, maintains statistics annually. The Administrative Office of the U.S. Courts has a case management system that we emulate. And as a result, we maintain pretty much the same identifiers that the other Federal courts use for their statistics. We have been using that as indicated in our annual report for the past 18 years.

The two additional items that are requested, I think one deals with numbers of cases that are over 18 months and then a breakdown of the specific types of cases such as single judge decisions, panel decisions, and full court decisions. We had not kept that information, but it is readily available. And as I indicated, that is just a matter of tweaking the annual report that we already provide.

Mr. HALL. Thank you.

You oppose section 302 of this bill, which essentially requires the Court to decide all allegations of error raised on appeal and mentioned that primarily in the interest of judicial economy, you do not address all the issues raised on brief by the appellant.

However, you concede in your testimony that this is a serious problem for the Court and one which has been raised by many of the Bar who have the privilege to come before you.

As you know, and as it has been raised repeatedly in numerous hearings before this Subcommittee, I read your reasons for opposing section 302 and wonder, do you think there are any Constitutional or other reasons as to why the CAVC should not be required to decide at least a preliminary opinion on errors or issues raised on the brief?

Chief Judge GREENE. Well, initially I would say that just as a first blush of the statute, we always want to ensure that we maintain separation of powers. You have the Court, you have the legislature, and you have the executive.

And, of course, the courts have specific responsibility in the area of conducting judicial review. The consideration of telling a court to decide all issues when, in fact, the court has the responsibility of deciding exactly what is needed to resolve the case, it just does not seem to serve any legitimate purpose unless it can be articulated well as to why those particular issues need to be decided.

Mr. HALL. Well, let me just take another tack at it then, Judge Greene. I am sure there is much about your job that I cannot possibly know, especially after the brief time I have been here in Congress.

But at the same time, we hear and see a stream of people talking about the hamster wheel that you referred to and the problem of issues being referred or a claim being referred up to the CAVC and

sent back down with a request for more information or more substantiation of one issue or one aspect of the claim and when that is provided could provide that it is sent back up again and then it is remanded back down again with another request or another aspect of the ruling.

This process is where the term hamster wheel came about, which did not happen because of one or two cases, you know. So maybe you could suggest to me, is there something that we could or should do?

I understand and support the concept of separation of powers, but we are dealing with a level of frustration that we are hearing from the VSOs, and from veterans themselves, and maybe you would have some suggestions for us.

Chief Judge GREENE. Some fixing may be required where the adjudications are conducted. The Court is tasked with reviewing what has been conducted and then making a determination if it was done legally correct. If it was done legally correct, that would be the end of the matter unless they then appeal to the Federal Circuit.

The hamster wheel effect as it applies to the Court is pretty straightforward. The issue that comes back to the Court is that the claim remains denied. The question is, upon what basis has it been denied the second time because when we remand the case the first time, we have indeed looked at every issue that has been raised by the appellant. The question is, why should we have to decide each issue raised if the appellant has prevailed.

And specifically, if we rule that the matter should be readjudicated and one of the other issues is a matter of facts that have to be later developed again, any decision that we would give on that particular issue would be more advisory than any holding because the facts will change when it goes back down to be considered by the Board or the Regional Office.

Now, the veteran has every right to present every one of those arguments that has been raised to the Court and not addressed to the Board or to the Regional Office when he or she returns to achieve further adjudication of the case. And if they were correct, as we ruled that they were correct in getting a new chance, they should prevail. If they do not prevail, then it is some other reason perhaps that brings them back to us.

This is probably more aggravated by the fact that procedurally there are issues that are raised to the Court that indicate that if they did not receive sufficient notice on how to substantiate their claim, that is a procedural error that is prejudicial to the veteran because now the veteran really is saying I have not had a fair chance to present my case.

If we agree with that veteran, we say you should go back and have your case adjudicated and when you do, bring all the evidence to the attention of VA that you think you should have been able to present had you been given the right notice.

Mr. HALL. Judge Greene, my understanding is that as an Article 1 Court, there is a separation on issue similarly to the Court of Appeals for the Armed Forces; is that correct?

Chief Judge GREENE. Separation of issues.

Mr. HALL. Yes, sir.

Chief Judge GREENE. I am not familiar with that.

Mr. HALL. Separation of powers for an Article 1 Court is different than that from——

Chief Judge GREENE. The concept would have to be the same, Chairman Hall, because really you are still dealing with a Court that the Congress created to provide this particular judicial review.

Mr. HALL. Right.

Chief Judge GREENE. And if there is no specific separation of powers statement, there is certainly an analogy.

Mr. HALL. Right. But it is not a court that comes from the Judiciary Branch, you know, by origin. I am wondering in particular if you are familiar with how the CAAF, the Court of Appeals for the Armed Forces, handles similar issues or do they?

Chief Judge GREENE. Well, first of all, cases coming to the Court of Appeals for the Armed Forces come by petition. So the accused or the person convicted must cite issues that they feel would be worthy of consideration by the Court.

So once the Court reviews those petitions and determines that there are worthy issues to be decided, they will take the case and hear it. Convicted persons, except for certain sentences, do not have an appeal by right like veterans do to our Court.

Mr. HALL. Thank you, Judge Greene.

My time has more than expired and I now yield to our Ranking Member, Congressman Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

Judge, on page 42 of the proposed law, lines 15 to 18, let me read a sentence and tell me if this helps at all. In a case in which the Court reverses a decision on the merits of a particular claim and orders an award of benefits, the Court need not decide any additional assignments of error with respect to that claim.

Now, does that help some in complying——

Chief Judge GREENE. I think the analogy would be the same if the Court finds a basis for remand. It need not address the others that would also give a remand.

Mr. LAMBORN. We have been talking in somewhat abstract terms. Can you give a real-life example where you think that the language would be harmful to the veteran or to the process?

Chief Judge GREENE. Where it would be harmful?

Mr. LAMBORN. Well, not so much harmful but a waste of judicial resources or somehow work to delay or somehow impede the veteran in his claim.

Chief Judge GREENE. You know, I think our end result was basically if we find prejudicial error in a veteran's case, we set the decision aside so that the veteran can have another chance. So that is very helpful. The question is, how many chances or how many reasons do we have to give for him to have that chance.

You asked for an example. The Veterans Claims Assistance Act requires that an individual be notified by VA of the information and evidence that would be helpful in substantiating his or her claim.

So VA then has to look at the claim and see what kind of claim it is and then say, well, these are the things that you need to show service connection. You need to show that you have a current dis-

ability. You need to show that you had an incident in service and you need to have medical evidence that connects the two.

So, the veteran presents evidence, but for some reason, it is denied. He comes to the Court after the Board has also denied it and says, number one, I got bad notice. They did not tell me how to really substantiate my claim. And then he also says they did not assist me in the development of my claim. And then they say, I did not get a chance to give my doctor's statement to the Regional Office.

So, number one, we look at the notice problem and in the notice problem, we see that the Board reviewed what happened and we determine that the Board said there was good notice, but we disagree with the Board and find that indeed there was a defect in the notice.

Then we make a determination whether or not—well, actually, the Federal Circuit says once we find bad notice, prejudice is presumed and then the Secretary has to demonstrate no prejudice. And if the Secretary does not demonstrate no prejudice, the result is to return the case for VA to do it over again and give him the correct notice and give him a chance to present all the evidence.

So we will rule that way. The government has not demonstrated no prejudice. And so what is left? He did not get assistance from the government. Well, it does not make any sense to go into two more pages of decision writing to talk about assistance when, in fact, assistance is going to start all over again.

And then he says, I did not get a chance to give my doctor's statement to the Regional Office. Well, it does not make any sense for the Court at that point to go through two or three more pages of the requirements for presenting evidence when, in fact, the individual now will have the chance to give that statement to the Regional Office.

And so simply stated, we were able to decide that case on the narrowest ground without having to go into unnecessary opinion writing on other issues which would not make any further difference in the case.

Mr. LAMBORN. Okay. Thank you for that example.

In a different subject entirely, there is less than a minute left, so I will ask for a brief response from you. You state in your testimony that the largest problem in terms of timeliness of cases before the Court is that parties file extensions of time to file briefs.

How can we in Congress help you with this problem or can we?

Chief Judge GREENE. Well, I am trying to condense it, so it will be brief. But I think the main situation here is that as an Appellate Court, each party has a right to present briefs to the Court in order for us to render the decision.

A lot of these extensions of times are coming from the government because of the magnitude of the size of the caseload. Consequently, we either deny the request for extensions and then throw the government out of Court or deny the request for extension and throw the appellant out of Court. And that, we do not want to do because that does not pursue the justice that we believe the veteran deserves.

We are taking steps within the Court to reduce the time, but the way the system is set up, because we go from a nonadversarial sys-

tem to an adversarial system and there is really no record of trial, we have to get a record of trial that then forms the basis of the appellate briefs. And, consequently, that consumes 254 days right there. And then when you add on the extensions to that, you do have extensive time involved.

Mr. LAMBORN. Okay. Thank you.

Mr. Chairman, I yield back.

Mr. HALL. The Chair recognizes Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman.

Judge, I just have a couple questions. They do not necessarily really, relate to your testimony, but I am just kind of interested and maybe you could share with me, or maybe if you do not know or could you find out.

What is roughly the amount of decisions that the CAVC overturns that are appealed to you?

Chief Judge GREENE. The number of decisions that are appealed to us.

Mr. HARE. Yes.

Chief Judge GREENE. This past fiscal year, I think it was around 4,600.

Mr. HARE. What is the main reason for the Court to overturn those decisions? Is it incorrect ratings or misinterpretation of veterans' law?

Chief Judge GREENE. I am sorry. Maybe I misunderstood your question. You asked what were the number of cases appealed to us?

Mr. HARE. Correct.

Chief Judge GREENE. Or how many reversals did we decide?

Mr. HARE. Correct.

Chief Judge GREENE. I do not have that number exactly. But there are very few reversals simply because we do not engage in fact finding.

And in order for us to reverse, we generally will either have to find that, as a matter of law, the Board was so incorrect in the application of that law that had they applied the correct law, another outcome would have resulted in which case, given the same set of facts, there would be a reversal and perhaps an award to the veteran.

Otherwise, we would have to determine if the Board's fact finding was clearly erroneous. And in that case, we might reverse the specific finding, but then you would have to examine the rest of the record to make a determination if whether on the face of that record there remains sufficient evidence that would otherwise warrant awarding a benefit to the veteran. If it does not, it is a matter of returning it to the fact finder for them to engage in the proper fact finding to reach a conclusion.

Mr. HARE. Okay. Well, and I know I probably even confused even myself with this question, too, so do not feel bad.

Do you know what the main reasons for the Court to overturn decisions are? You know, in other words, is it incorrect ratings? Is it misinterpretation of veterans' law, under-development of the claim? What do you see as the main culprit here?

Chief Judge GREENE. Well, recently, there have been a lot of errors in the notice arena as in the example that I gave you. And the

law continues to develop in that area because of our decisions as well as the decisions of the Federal Circuit. But we get all types of benefits decisions before us, so it is kind of hard for me right now to say exactly. I will take a look at that and get some information to you.

Mr. HARE. I would appreciate that.

Chief Judge GREENE. All right.

Mr. HARE. Thank you very much.

Thank you, Mr. Chairman.

Mr. HALL. Thank you, Mr. Hare.

Judge Greene, if I may, could I ask you, understanding your concerns about issues pertaining to the precedential value of the Court's decisions, do you think that each of the issues raised should be fully considered and ruled on and then, if necessary, indicate that the decision is made without prejudice to the appellant even if a full opinion might not be warranted or necessary? Might the Court, for instance, be able to issue a preliminary opinion that does not have a precedential effect?

And the reason I ask this is once again because we are trying to give the veteran, or the veteran's representative, the opportunity to understand upon remand what all of the issues that they are going to have to deal with are. And what we are hearing back from them is that because of the policy of not doing that extra work on the other—once you have come across a procedural issue that requires a remand, then it is sent down without the others being commented on.

So the question is, could the Court issue a preliminary opinion on those other issues that is not precedential in effect?

Chief Judge GREENE. We treasure the concept of preserving judicial resources, but I want to certainly correct any misperception that we are doing it just to avoid the work.

Mr. HALL. I never thought so, sir.

Chief Judge GREENE. I know. And, consequently, I think it is very important to understand, too, that we do not have a policy. That is not a policy. The policy is to decide the case fairly and wisely.

And, consequently, I can assure that all of my colleagues and I look at each case and we do, in fact, consider every issue raised by the appellant. And then after we have considered those issues and deliberated over the government's side and the appellant's side, we make a determination as to how the case should be disposed of. And if a decision is made to remand the case, then all of that falls into that reasoning.

To give a preliminary finding is to give what we would call in the appellate practice an advisory opinion because it would not have any binding effect upon anybody. Of course, the Board, if we told the Board, well, hey, by the way, you should, in fact, be sure that the veteran gets a chance to give his evidence to the Regional Office, we can do that anyway without necessarily rendering a full dissertation on that. And in most cases, we will.

Please understand that we look at these issues and where there is, we believe, a need to send a signal or send a message to the Board, we will do that and we do do that.

Mr. HALL. Judge, would administrative law judges work better in this role?

Chief Judge GREENE. Administrative law judges would work great at the VA level and the Board.

Mr. HALL. And I just want to ask you one more question. It has to do with our proposal regarding the Veterans Claims Assistance Act (VCAA) letters.

There are some who believe that the problems with the VCAA letters stem from numerous court decisions rendered since its inception that add requirements beyond congressional intent and which have resulted in a duty to notify letter that is nearly incomprehensible to veterans.

If VA provided a clear check list to veterans outlining what is needed as evidence to develop, do you think the Court would still be required to render decisions that require more information to be added to the letter to clarify VA's responsibilities, if you can provide such an opinion?

And the reason I ask is because the VA contends that the Court's requirements imposed in cases such as Vasquez Flores are overstepping the original Congressional intent and treading into Article I jurisdiction.

I know this may be a stretch for you, but would you please give your general impressions as to whether VA is satisfactorily meeting its duty to notify since the passage of VCAA and if you can, can you conceive of any or comment on what proper VCAA notice might contain?

Chief Judge GREENE. At the outset, just let me say that for 8 years, there has been litigation over the "Veterans Claims Assistance Act." I mean, Congress decided to pass that after there were some rulings about the well-grounded claim concept, but that is another story.

In 2000, I thought the message was clear that all the VA had to do was do a check list and run down and make sure the veteran understood what it was that they had to present. And that is the message that the Court has been trying to convey over the last 7 years and the Federal Circuit.

Now, Vasquez Flores is a pending case that I would refrain from commenting on, although I am very curious that you have that given that there is currently pending some litigation on that.

Mr. HALL. Thank you, Judge Greene.

Mr. Lamborn, you have more—Mr. Bilirakis.

Mr. BILIRAKIS. I have no questions at this time.

Mr. HALL. Okay. Since everybody else has no questions, let me just ask you one more. I promise this is the last one.

Could you describe the Court's interpretation of the Best and Mahl cases and how it believes these cases control its ability to decide all assignments of error based on appeal or raised on appeal?

Chief Judge GREENE. The Best case——

Mr. HALL. The Best case and the Mahl case.

Chief Judge GREENE [continuing]. The Best case was written simply to highlight and convey the Appellate Court practice of deciding issues presented to the Court on the narrowest ground and that you would look at the case and make a determination as to how best can justice be done in this case.

Mahl extended that to the extent that it also recognized that the Court could entertain multiple issues if they found it necessary. And those guiding principles are what the Court employs when we look at each and every case. The judge makes a decision after looking at all the issues presented as to what he or she thinks needs to be decided to get the case back in the hands of the people who should have it.

Mr. HALL. So given the confines of Best and Mahl, could you conceive of the Court exercising its discretion more broadly to reach to the assignments of error raised on appeal?

Chief Judge GREENE. You have to understand, you look at the Mahl case and you can look at the Wells case and you can see dissents on those cases that talk about, hey, we should consider everything or what have you.

But if a particular judge may want to address a particular issue, then the question is, does the majority agree that that issue should be addressed in that particular case.

But clearly each case will have to stand on its own merits and I do not see how you can have a blanket rule. In my prepared statement, I indicated that there is a strict rule about not taking on Constitutional issues.

If an appellant or veteran raises a Constitutional issue, this statute would require us to address it even though we would not necessarily be required to, or if he submits 300 issues, would we then have to submit discussion on all 300 issues?

Mr. HALL. Mr. Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman. I did have a brief followup question on the matter you just raised, the Constitutional question.

The precept against deciding Constitutional questions that are not necessary for the adjudication of the case, how often does that come up?

Chief Judge GREENE. Very infrequently.

Mr. LAMBORN. Okay. But on the occasions where it does, then——

Chief Judge GREENE. In a pro se case, we might bend over to make a consideration of that.

Mr. LAMBORN. Okay. All right. Thank you.

Chief Judge GREENE. By the way, sir, congratulations on Kansas.

Mr. HALL. Judge Greene, thank you so much for your testimony and your presence here today and your work that you do. And Judge Lance and Judge Schoelen is it?

Chief Judge GREENE. Schoelen.

Mr. HALL. My eyes are not all the way there.

Thank you very much. If we have any further questions, we will submit them in writing.

Chief Judge GREENE. Yes, sir. And may I also offer, if there is any further information that you do need, Judge Schoelen and Judge Lance would be more than happy to meet with each Member or Members of your staff individually.

Mr. HALL. Thank you very much. The panel is excused.

I call our second panel to the table now, Kerry Baker, Associate National Legislative Director of Disabled American Veterans (DAV); Ronald B. Abrams, the Joint Executive Director of the Na-

tional Veterans Legal Services Program (NVLSP); Steve Smithson, Deputy Director of Veterans Affairs and Rehabilitation Commission at the American Legion; Eric Hilleman, Deputy Director, National Legislative Service, Veterans of Foreign Wars (VFW) of the United States; and Carl Blake, the National Legislative Director of Paralyzed Veterans of America (PVA).

Gentlemen, thank you again for joining us and for your patience. And your statements have been entered into the record as written, so we are recognizing each for five minutes beginning with Mr. Baker.

STATEMENTS OF KERRY BAKER, ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; RONALD B. ABRAMS, JOINT EXECUTIVE DIRECTOR, NATIONAL VETERANS LEGAL SERVICES PROGRAM; STEVE SMITHSON, DEPUTY DIRECTOR, VETERANS AFFAIRS AND REHABILITATION COMMISSION, AMERICAN LEGION; ERIC A. HILLEMAN, DEPUTY DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; AND CARL BLAKE, NATIONAL LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA

STATEMENT OF KERRY BAKER

Mr. BAKER. Thank you, Mr. Chairman, and Members of the Committee.

On behalf of the DAV, I am pleased to offer my testimony to address the "Veterans Disability Benefits Claims Modernization Act."

Section 101 of the Act provides a presumption of service connection for post traumatic stress disorder for veterans diagnosed with such and who engaged in combat with the enemy. My statement on this issue is, therefore, limited to combat-related PTSD.

While the DAV supports this provision, we feel the current high standards required by VA's internal operating procedures for verifying veterans who engaged in combat with the enemy are impossible for many to satisfy. This is usually due to unrecorded traumatic events taking place on the battlefield, unrecorded temporary detachments of servicemembers from one unit to another while in the theater of operations, or simply poor recordkeeping.

Our concern is that with defining who is considered to have engaged in combat with the enemy, this provision will be rendered moot by VA's internal requirements.

The provisions of the applicable statute, section 1154, and the applicable regulation, section 3.304(f), are uniform in relation to those who engaged in combat with the enemy.

Together they require VA to accept a sufficient proof of service connection for any disease or injury resulting from such service absent clear and convincing evidence to the contrary, credible, satisfactory, lay, or other evidence of service incurrence of the disease or injury if consistent with the circumstances, conditions or hardship to the veteran's service and notwithstanding the fact there is no official record of such incurrence in the service.

The regulation further reiterates that when these perimeters are met, the veteran's lay testimony alone may establish the incurrence of the claimed in-service stressor.

Neither the statute nor the regulation requires validation by official military records of an in-service combat stressor. Nonetheless, VA's adjudication procedure manual requires proof that a veteran engaged in combat through official military records, thus contradicting the intent of the statute and ignoring its own regulation.

These internal instructions defy incredible supporting evidence that an in-service stressor occurred as evidence that specifically documents personal participation in the event that indicates the veteran served in the immediate area and at the particular time in which the event is alleged to have occurred.

Having said that, we do, however, acknowledge that VA most likely promulgated these internal instructions based on its interpretation that the statute and regulation failed to define who is considered to have engaged in combat.

We nonetheless respectfully disagree with that interpretation as well as the extra statutory and regulatory path in which VA chose to create a substantive rule of law.

The DAV believes your bill would better deliver its intended effect if it amends 1154(b) to clarify when a veteran is considered to have engaged in combat or defines those who have engaged in combat under the definitions of section 1101, either of which I will readily admit is not an easy task.

Section 107 of the Act expands authorization for developing, submitting, and certifying a claim is fully developed by veterans' representatives. There are many obstacles in the path of this novel idea. Because of those obstacles, the DAV would like further discussions and a better understanding of the nature of this provision before we can determine the level of our support or opposition.

Section 108 requires a study that considers employing medical professionals to assist VBA. Based on our comprehensive experience in the claims process, one that dates back to a time when VA employed medical professionals in the claims process, we must oppose this section of the bill.

The biggest challenge facing VA decisionmakers results from inadequate legal training, not inadequate medical training. Misunderstandings of the law can offer far more errors than do misunderstandings of medicine.

Section 301 increases the reporting requirements of the Court and section 302 modifies the jurisdiction of the Court. Each of the foregoing provisions is nearly mirrored in the *Independent Budget (IB)* for fiscal year 2009. We strongly support each and commend Chairman Hall for the recommendation.

At present, I have only commented on a few of the sections of the bill, but have done so in the remainder of my written testimony. I will be happy to answer questions on these sections or any other section should you have any.

[The prepared statement of Mr. Baker appears on p. 46.]

Mr. HALL. Thank you, Mr. Baker.

Mr. Abrams, you are now recognized.

STATEMENT OF RONALD B. ABRAMS

Mr. ABRAMS. Good afternoon, Mr. Chairman and Members. I am pleased to have the opportunity to talk to you today on behalf of the National Veterans Legal Services Program.

I want to thank you for your hard work and I especially want to thank the staff on both sides for their contribution to this bill. It has been long overdue.

We would first like to talk about section 101. And we feel though well intentioned as written, section 101 would have very limited positive impact. We know that in Iraq and Afghanistan, there is really no specific front or rear area. No servicemember is really safe in either place and just about everyone there is subject to enemy attacks.

Therefore, we suggest that 101 be redrafted to establish a presumption of service connection for PTSD if the veteran served on active duty in Iraq or Afghanistan and currently suffers from PTSD. And we would also like to extend this to veterans who did not serve in Operation Iraqi Freedom (OIF) or Operation Enduring Freedom (OEF) but did serve in a combat zone during active duty.

We think that the presumption should apply unless there is clear and convincing evidence that the veteran's PTSD is caused by a stressful event that did not occur during a period of military service, and I would like to add this to my written testimony, in OIF or OEF or in a combat zone. That should satisfy everybody. A doctor is going to have to link the current PTSD to an event that happened during service in a combat zone or in Iraq and Afghanistan.

We would also like to stress that the VA spends a lot of money and time and makes veterans wait a very long time until they determine whether or not evidence of a stressor can be confirmed to make it credible. If this law, the way we propose it is changed, the VA will save an awful lot of time and veterans will get their answers in a much quicker fashion. It would help on the backlog and in other areas.

I would like to stress that we support the study of the work credit system. NVLSP believes that this study is long overdue. However, having the VA study its work credit system is like asking the fox how to determine whether henhouse precautions are effective. We would hope that you would get an independent group like GAO to do this.

We want to stress that the things that cause remands from the Court, that cause the hamster wheel effect, are things like control of claims, supervisory review of delayed claims, thorough development of the evidence needed to decide a claim properly, recognition of all issues, provision of adequate notice, documentation that that notice was given, and careful quality review.

All of these things take time. And because they affect the productivity and effectiveness and timeliness of a Regional Office, there are times when VA managers take shortcuts and that results in improper denials which go to the Court, which go back to the Board, which go back to the Appeals Management Center, and drive veterans crazy.

Thank you very much.

[The prepared statement of Mr. Abrams appears on p. 52.]

Mr. HALL. Thank you.

Mr. Smithson, you are recognized.

STATEMENT OF STEVE SMITHSON

Mr. SMITHSON. Thank you, Mr. Chairman and Members of the Subcommittee. Thank you for this opportunity to present the American Legion's views on this important draft bill being considered by the Subcommittee today.

As detailed in my written statement, the American Legion generally supports the major provisions of this legislation. My remarks this afternoon, however, will focus on Title 1, section 101 in order to clarify and otherwise expand on portions of my written statement regarding the section.

There are three requirements that must be met in order to establish entitlement to service connection for post traumatic stress disorder, a current diagnosis of PTSD, credible supporting evidence that the claimed in-service stressor actually occurred, and medical evidence of a causal nexus between the current PTSD symptomatology and the claimed in-service stressor.

According to 38 CFR section 3.304(f)(1), if the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear, convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of that veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Proposed section 101 of this draft legislation, as currently written, would essentially establish presumption of service connection for veterans who have been diagnosed with PTSD if they can prove they engaged in combat with the enemy.

Because of the presumptions already afforded in 38 U.S.C. § 1154(b) and 38 CFR 3.304(f)(1), veterans who can establish that they engaged in combat with the enemy have a much easier time of establishing entitlement to service connection for PTSD than veterans who cannot prove they engaged in combat with the enemy.

This being the case, we do not think that section 101 as currently written would have the positive impact that was obviously intended. Unless the veteran was wounded or received a specific combat decoration or badge such as the Combat Infantryman Badge (CIB) or Combat Action Ribbon or an Award for Valor, it is often very difficult to establish that the veteran engaged in combat with the enemy in order to verify the claimed combat-related stressor.

Even the term engaged in combat with the enemy has taken on a different meaning as the nature of warfare in today's world has changed. This is especially true of service in combat theaters of Iraq and Afghanistan.

Due to the fluidity of the battlefield and the nature of the enemy's tactics, there is no defined frontline or rear safe area. Servicemembers in noncombat operations or occupations and support roles are subjected to enemy attacks such as mortar fire, sniper fire, and improvised explosive devices just as their counterparts in combat arms-related occupational fields.

Unfortunately, such incidents are rarely documented making them extremely difficult to verify. Servicemembers who received a combat-related badge or Award for Valor automatically trigger the combat-related presumptions of section 1154(b) and 38 CFR 3.304(f)(1).

But a clerk riding in a Humvee who witnessed the carnage of an improvised explosive device (IED) attack on his convoy does not automatically trigger such a presumption and proving that the incident happened or that he or she was involved in the incident in order to verify a stressor in relation to a PTSD claim can be extremely time-consuming and difficult.

Moreover, such claims are often denied due to the veteran's inability to verify the alleged combat-related incident, the stressor to the satisfaction of the Department of Veterans Affairs.

For the reasons and examples just discussed, the American Legion supports the establishment of a presumption of stressor for the purpose of establishing entitlement to service connection for PTSD for any veteran who served in Operations Iraqi Freedom and Enduring Freedom as long as the alleged stressor is related to enemy action and is consistent with the circumstances, conditions, or hardships of such service.

Additionally, as a point of clarification, the American Legion does not oppose extending this presumption to veterans who served in other combat theaters. We, therefore, request that section 101 be revised to establish a presumption of exposure to stress as just discussed for veterans who served in Iraq and Afghanistan, as well as other combat theaters.

Such a presumption will not automatically presume service connection for PTSD, but will concede that the alleged stressor actually occurred as long as the stressor is related to enemy action or the result of enemy activities and is consistent with the circumstances and conditions of such service.

The veteran would still need a current diagnosis of PTSD and medical evidence of a causal nexus between the PTSD and the claimed enemy action-related stressor.

As verifying the alleged stressor is often the most time and labor-intensive requirement to satisfy in a PTSD claim, such a presumption would not only benefit the veteran but would also benefit VA by negating extensive development and in some cases over-development of the stressor portion of a PTSD claim and in doing so reduce the length of time it takes to adjudicate such claims.

Simply put, as PTSD is already a condition for which service connection can be established, this proposal would not be creating a new benefit, but would merely be streamlining the stressor verification requirement for veterans who served in Iraq and Afghanistan and other combat zones and in the long run would save VA time and resources by reducing the amount of work it would have to do in developing for verification of the stressor.

That concludes my statement, Mr. Chairman, and I would be happy to answer any questions you or Members of the Subcommittee may have.

[The prepared statement of Mr. Smithson appears on p. 56.]

Mr. HALL. Thank you, Mr. Smithson.

Mr. Hilleman.

STATEMENT OF ERIC A. HILLEMAN

Mr. HILLEMAN. Mr. Chairman, Ranking Member Lamborn, and Members of the Subcommittee, on behalf of the 2.3 million men and women of the Veterans of Foreign Wars and our auxiliaries,

I thank you for the opportunity to present our views today on this important legislation titled "Veterans Disability Benefits Claims Modernization Act of 2008."

We also want to thank you and your staff for their dedication to America's veterans and we want to commend this Committee for its willingness to work with the VFW and other VSOs to craft this legislation.

The modernization and improvement of the Department of Veterans Affairs claims processing system is a project that has long been in the making. This bill has taken shape in response to growing wait times, increasing complexity of claims, and growing numbers of veterans seeking benefits.

The legislation we discuss today represents an incorporation of many recommendations of recent commissions and it is the most substantive step we have seen to date on the road to reforming and improving the VA benefits delivery system.

We sincerely hope that the energy expended today and in the crafting of this legislation continues to facilitate the necessary follow through that will ensure implementation of the recommendations contained herein.

We recognize that this legislation is evolving. Given the length of the bill, we will focus our comments on a few specific provisions.

Section 101 seeks to establish presumptive service connection for PTSD for veterans that "engaged in combat with the enemy in active service with military, naval, or air organization of the United States during a period of war, campaign, or expedition, and who is diagnosed with post traumatic stress disorder."

While well-intended, it is our view that the definition misses the mark. The VA has no problem granting service connection for PTSD even many years after service. What it does have a problem with is granting service connection for PTSD when a combat medal is absent. The goal of this provision is to lessen the burden of establishing the existence of a stressor event.

We recommend tightening the definition as stated in our written testimony to ensure that veterans of the U.S. Armed Services receive the care they deserve.

Section 102 would establish an Advisory Committee to study the disability rating schedule. We urge you to ensure this Committee is independent, beyond reproach, and represents the best interests of veterans.

The VFW supports a measured review of the rating schedule as stated by my colleague, Gerald Manar, before this Committee on February 26th of this year. We firmly believe that a one-time adjustment of the current schedule will not be sufficient to keep pace with the changing nature of quality of life and the evolving science of medicine, technology, and warfare.

Section 107 would establish a mechanism to expedite and encourage fully developed claims. We strongly support this provision. To guarantee that the practice actually works, VA should require that Regional Office personnel, managers, and veteran service officers are adequately trained to recognize a ready-to-rate claim and understand that the receipt of such a claim triggers actions, which facilitate prompt adjudication.

Section 110 calls for VA to review its process and develop a comprehensive plan to incorporate information technology into the claims adjudication process. VA is asked to examine how it might transfer all prescribed benefits processing tasks and information into computer software programs that eliminate the need for paper claims and provide remote access to veterans seeking information on their claim.

We encourage VA to utilize properly programmed computers and apply regulations to discreet data arriving at a concrete evaluation for the veteran. Well-employed software programs will free up adjudication experts to work on claims requiring more thought and decisions.

We ask this Committee for the opportunity to submit our views for the record and work closer with the staff to improve veterans benefits claims processing.

We welcome any questions this Committee may have and we thank you.

[The prepared statement of Mr. Hilleman appears on p. 60.]

Mr. HALL. Thank you very much, Mr. Hilleman.

Mr. Blake, you are now recognized.

STATEMENT OF CARL BLAKE

Mr. BLAKE. Mr. Chairman, Members of the Subcommittee, on behalf of Paralyzed Veterans of America, I would like to thank you for the opportunity to testify today on the "Veterans Disability Benefits Claims Modernization Act of 2008."

Due to the scope of this proposed legislation, I will limit my comments to only a few of the provisions in the bill.

With respect to the provisions of section 101, PVA generally supports the intent of the proposal to establish a presumption for service connection for veterans who have deployed to a combat theater and who present symptoms of PTSD. However, we do believe that there are flaws in the legislation as drafted.

First, the legislation establishes a standard that we believe is very difficult to prove in order to qualify for presumption. Specifically, the legislation states that the veteran must have engaged in combat with the enemy.

This places the burden on the veteran to identify a specific event and submit evidence demonstrating that he or she was, in fact, under fire from the enemy. We do not believe that this is the actual intent of the legislation as it would make it even harder to receive a presumptive rating for PTSD than what currently exists in statute.

Second, this section allows for a significant increase in the claims backlog. As written, the legislation would allow a veteran who meets the defined criteria to file a claim for presumptive service connection, including veterans of all war periods. If this is, in fact, the intent of the Subcommittee, we believe this needs to be clarified.

We have no objection to section 107 of the proposed legislation that is meant to expedite consideration of a fully-developed claim.

We appreciate the recognition given to the work of service officers of the Veterans Service Organizations under the newly-created section 5109(c). However, we do have some concern about the re-

quirement for a check list to be provided to individuals submitting claims.

It seems that in order for the VA to provide a check list of missing items in an incomplete claim, it will have to already adjudicate the claim. We do not believe that this is the intent of the Subcommittee as well and we believe that the provision warrants further consideration and clarification.

Recent hearings have demonstrated how far behind the VBA is in using information technology in its claims adjudication process. While we believe that the entire claims process cannot be automated, there are many aspects and steps that certainly can.

We have long complained to the VA that it makes no sense for severely-disabled veterans to separately apply for the many ancillary benefits to which they are entitled. Their service-connected rating may immediately establish eligibility for such benefits as the Specially Adaptive Housing Grant, adaptive automobile equipment, and education benefits. However, they still must file separate application forms simply to receive these benefits. That makes no sense whatsoever.

Furthermore, certain specific disabilities require an automatic rating under the disability rating schedule. It does not take a great deal of time and effort to adjudicate a below-knee, single-leg amputation. An advanced information technology system can determine a benefit award for just such an injury quickly. With these thoughts in mind, PVA fully supports the provisions of section 110.

With respect to the transition of servicemembers from active duty to veteran status outlined in Title 2 of the legislation, we certainly support the intent.

As mentioned in the legislation, the VA and DoD are currently conducting a pilot program that addresses this issue and we look forward to their findings during the conduct of this program.

We do believe that the language should stipulate that the VA be responsible for actually performing the separation physical. The VA has greater experience at providing a comprehensive medical examination as it requires the most thorough medical review of a veteran to determine a degree of disability.

We are pleased with the fact that the legislation calls for the DoD to only determine fitness for duty as part of the process and the VA to actually determine the degree of disability.

Finally, Mr. Chairman, I would like to thank you and Mr. Lamborn and your staffs for allowing us the opportunity to meet in advance of this hearing to discuss the original draft of the legislation and to outline many of our differences and to consider what we had to say as they continue to refine this bill. And we look forward to further discussion with the Subcommittee staff.

With that, Mr. Chairman, I would be happy to answer any questions that you might have.

[The prepared statement of Mr. Blake appears on p. 64.]

Mr. HALL. Thank you, Mr. Blake.

Thank you to all of our witnesses. And I, too, would like to thank all of you and your organizations for the input that you have had and the staff on both sides for the long hours that you have put into this. I know it has been a cooperative effort and that is something that we should all be proud of.

I think that there are a number of cases, as you have pointed out. Each of you, I think, spoke more about the things, the sections of the proposed legislation that you have problems with because under the 5-minute rule, if you talk about the things you like, you tend to run out of time too soon. So I understand that and obviously that is where we need to spend our time is working out the kinks.

Mr. Baker, first of all, thank you for your accurate description of the problems many combat theater veterans face in trying to document stressors and the stringency with which VA has chosen to implement 38 U.S.C. § 1154.

Our intention with section 101 is to provide veterans diagnosed with PTSD a means by which their claims can be granted when specific documentation of a stressor does not exist, is classified, or has been lost.

And I am sorry to say that I agree with you now having heard your testimony or read your testimony that our language does, in my opinion, need to be changed because of the fact that combat with the enemy leaves out people who legitimately can claim service-related stress causing PTSD, many examples of which you have given.

Based on your experiences, is there a better way to define this or to hold VA more accountable?

Mr. BAKER. Well, that is a very difficult question, I think. And part of the reason for my testimony, both my oral and my written, I mean, I believe that, you know, we have to apply the law in a strict manner or else these proceedings become somewhat meaningless.

Having said that, I do not think the VA set out to violate the law. I think they honestly looked at the statute and regulation and interpreted it as not providing definition of who is engaged in combat, therefore, took it upon themselves to do that.

My disagreement with that would be it should be in the regulations so that proper challenges could be made if somebody disagrees with it.

Nonetheless, I understand and they have a very valid argument that they could say that it does not define it and, therefore, we did. So, you know, I respect that position.

As far as how to define it, you know, on one side of the coin, you expand it out to everybody that served in a combat zone and which includes areas outlying in this case, it would be Iraq or outlying Afghanistan and that may be a little bit too liberal. On the other side of the coin, you have the current requirements to show official military records that you actually were in a fire fight. That may be too conservative.

And I understand the need to balance the interest of the veteran as well as the interest of the government. So I think you are coming down to a conclusion that you have to answer both questions, do you want to create a system that can be a little easier gamed some would say by a few people, some would say by a lot of people, but where that no deserving veteran goes without the benefit that they are entitled to or a system where very few people can game it. And I think very few can game it now.

The flip side to that is you get deserving veterans that do without a doubt go without it. And I think more go without it than are able to game the system the way it is now. So where is the happy median?

Mr. HALL. Well, thank you, sir.

Mr. Smithson suggested or supported having a stressor for deployment or service in OIF/OEF and service in other combat zones if I have my notes correctly. And Mr. Abrams' similarly recommended OIF/OEF and other combat zone active duty unless clear evidence exists that the stressor comes from an event that happened when not in combat.

Mr. BAKER. Yeah. As far as the combat-related PTSD, I mean, I would agree that one possible definition would be something similar to, you know, a veteran has presumed to have engaged in combat when they have served in a combat theater of operations, in other words, within the borders of the country where the combat is.

When they have submitted, absent clear and convincing evidence to the contrary, credible, satisfactory, lay, or other evidence, you know, something to that effect, I think that is one possibility. I think you are still going to have some say that is too conservative, some say it is too liberal.

Mr. HALL. Not me.

Mr. BAKER. Okay. And I feel for Congress at this point because that is a difficult question to answer. But I would agree that is definitely one possible solution. Did I answer that at all?

Mr. HALL. Yes. I just want to move along and ask Mr. Abrams, regarding sections 103, 105, and 106, could you elaborate on what elements NVLSP considers to be crucial in a quality assurance program? How should an independent assessment of quality be performed by an outside contractor and do you have examples of such service?

Mr. ABRAMS. For a while, many years ago, I worked in VA quality review. The problem became quite apparent to us when we were VA employees that when the Regional Offices checked their own quality, if they found it bad, then the managers would not get promoted or bonuses. So very few people had bad quality reported. Even when we found errors, people would call VA's Central Office and say we would like them to change their error calls. That might be happening today. You would have to ask someone from the Compensation and Pension Service.

I would think that people who work for the Secretary, people who are not under the direct supervision of Veterans Benefits Administration would have a better chance of doing an accurate quality check than people who work within the Compensation and Pension Service or work for Veterans Benefits Administration.

There is a wealth of knowledge out there today that was not in existence in the 1980s. More people work in veterans' law and you should be able to hire people who can look at a claim from the point of the VA claimant, check what the VA should have done, and make honorable errors calls that would help improve the VA system.

Now, that would cover what was that, section 104 or I do not know if I answered all of your questions with that answer.

Mr. HALL. Sections 103, 105, and 106, but you did. You did just fine. Thank you.

Mr. Smithson, the American Legion seems to have a lot of experience on the PTSD problem that exists in the field and I must say that is the issue most vets in my district come to me for in terms of casework that we see.

Not only do we hear about it, but we see it in the district, people who have gone through the process with the VA and gone the normal route of going to the RO and applying, submitting a claim, and having it denied and then some years later, be it 50 years later for a World War II vet recently to 2 years later for an OIF vet who recently came to our office, that they come to us and we get the claim reversed.

And it has happened so much. I know that we are seeing the cases where people are unhappy. That is what happens with us as Members of Congress, you know, we get the casework where people are not satisfied and they come to us. But, nonetheless, it seems to be the predominant theme.

So I was curious to follow up on your testimony, when you said that VA has a tendency to over-develop cases. Do you think the VA wastefully expends resources on extensive development and do you have a broader definition to offer us for that language where the legislation as drafted says engaged in combat with the enemy, and all or most of you at any rate commented on that being too narrow? How would you suggest we word that?

Mr. SMITHSON. Because of the changing battlefield and basically what we have in modern warfare today as good examples by what is taking place in Iraq or Afghanistan, the term engaging in combat with the enemy takes on a whole new meaning.

The example I gave in my testimony was a clerk riding in a Humvee whose convoy is attacked and he witnesses the carnage of an IED attack. That person would not necessarily be engaging in combat with the enemy if he did not take fire or direct fire to the enemy. However, he obviously experienced a stressor, a stressful event.

So I think changing the definition from engaged in combat to the enemy to looking at combat-related stressors, stressors that are the result of enemy action or enemy activity because I think that is what we are seeing a lot of in Iraq or Afghanistan.

And being able to presume exposure to a stressor for individuals in those type of combat theaters without having to necessarily submit the documentation which in a lot of cases does not exist and these individuals might not necessarily have combat awards but by being able to presume that the stressor happened because it is consistent with the hardships and the circumstances of that service, it would make things a lot easier not only for the veteran to get their benefits, for the VA, they would not have to do a lot of development. They would be able to concede that part of it and move on, and it would help eliminate a lot of the backlog.

Mr. HALL. Thank you, Mr. Smithson.

I am going to turn now to our Ranking Member, Congressman Lamborn.

Mr. LAMBORN. Thank you, Mr. Chairman.

And this question is for any one of the five of you. Section 101 as it is currently written, do you believe that it could either expand the backlog or lead to possible additional fraud? And this is any one or all five of you.

Mr. BLAKE. Mr. Lamborn, I will take that question. I think my statement, I hate to use the word fraud because I know last year in some of the discussions with legislation, it got a real rise out of the Committee, to imply that any veteran would perpetuate fraud against the VA.

But I do not think you can discount the possibility. Maybe it is not even a matter of fraud. I think the question is, you know, an example that when we talked to the Committee staff about this is someone who perhaps served in Iraq or Afghanistan and comes home and is involved in something at home, whether it be a car accident or whatever, that is obviously a stressful event, a traumatic event that could just as likely lead to PTSD. But in all likelihood, that individual is still going to receive a presumptive service connection.

Under what was the original intent of the legislation, I do not think that would happen. Certainly under the current draft of the legislation. The intent of the legislation, as we understood it in dealing with the Subcommittee staff, was there is this implication that any service in Iraq or Afghanistan is essentially a stressor and, therefore, there should be a presumption for service connection.

I think that is what is the underlying implication of the legislation. I think if anything, with the rewrite of the legislation that is in the current form of the bill, it is tailored down to such a point that it does not support that idea.

And so to some degree, what the VA currently uses and the statute supports it, but I think, not to speak for my colleagues here, but I think the idea is that it needs to go farther than just simply saying presentation of a combat medal is enough to qualify you because there are obviously circumstances where it could be beyond that.

Even the example that Mr. Smithson used, that individual maybe does not qualify for a combat medal, maybe for a V device, but is that situation any less of a stressor?

So I think the things do not tie together to support what I believe is the intent from what we have heard from all of the Committee staff when we met initially on this.

Mr. LAMBORN. Thank you.

Anyone else? Mr. Abrams.

Mr. ABRAMS. Yeah. I would like to point out that as we proposed changes in the bill, no one would get service connected unless a doctor determined that the veteran had the symptoms that would qualify for PTSD and the doctor linked the current symptoms to the alleged event.

Basically what you are establishing if you write this bill right is that the VA does not have to spend several years trying to find unit records or the veteran does not have to petition the VA to write letters to fellow servicemembers years later to confirm the fact that the Humvee was blown up.

If you do that, you have protected against any attempts at fraud. And also, people who come back from combat areas come back, some of them are mentally fragile. I took my father years ago to see Saving Private Ryan. He was a veteran of World War II and was part of Anzio and southern France and he was in invasions where he hit the beach. He walked out, and he did not go out of his house for several days.

People can be fragile and an event after service can trigger the memories that people try for a long time to forget. So I am not sure there is as much fraud as people think. So I would say if you write it right, you are going to be fine.

Mr. BAKER. I would like to try to answer that. As far as the fraud question, I say absolutely not. You asked as is currently written. The only thing I think would change in the way it is currently written is the link between the stressor and the diagnosis because it does not change VA's internal mechanism for determining who engaged in combat. So that determination, which usually requires official records, would stay in place. The requirement for the diagnosis would stay in place.

The presumption, as written, would do away with the link when you meet those two criteria. And I can tell you after reviewing tens of thousands of cases in my career, that is not the problem. If a veteran has official records and the diagnosis, they are almost never denied.

Again, I think exactly what everybody else has said. The problem is in many cases, when you know a veteran did participate in combat, but there are no official records, either poor recordkeeping from the military or they were detached to a different unit for a temporary period of time, like in a convoy. I mean, there is usually a record of event somewhere.

But in that last example I just gave you, the veteran may not know what unit that he was attached to for a short period of time, an hour or a day, especially when he was attached to something else the following day and something else the day after.

And so that unit that was attacked may have a record, but his unit will not. And so he cannot prove it. So there lies the problem and if you could fix that with the DoD, you could probably fix this whole thing. But you are not going to.

The issue of the claims backlog, as it is written, I think since it would not change much, I think everything will stay just about the same. But I have to say I absolutely do not agree with those that would say we should not make it easier for legitimate combat vets to prove they were in combat based on the claims backlog.

And I realize that goes against everything you hear us say a lot of times about the claims backlog, but if we have a law that we can make that is going to help benefit veterans, it should not be withheld because of the backlog. And that is my position on that.

Mr. LAMBORN. Okay. Thank you, gentlemen.

And, Mr. Chairman, I yield back.

Mr. HALL. Thank you.

Thank you all for the work that you have done with us and with the staff and for your service to our country and to our veterans and for your testimony today. This panel is now excused. Enjoy the rest of the afternoon.

Oh, I am sorry. Excuse me. Mr. Bilirakis, you are now recognized.

Mr. BILIRAKIS. I guess I have been too quiet over here.

Mr. HALL. Mr. Bilirakis for 5 minutes.

Mr. BILIRAKIS. Thank you very much.

Thank your for your testimony.

To the entire panel, what do you believe are the biggest obstacles we need to overcome to improve the overall quality of the claims adjudication process?

Do you think the legislation that we are considering today will improve the quality of claims, the claims decision process? Do you have any recommendations or additional items that should be addressed by this legislation? And for the entire panel.

Mr. ABRAMS. Yes. I think that unless you change the VA work measurement system, while you can make small changes that will improve things, you will not change the overall problems until VA managers are encouraged to do it right at the beginning, to develop the claim properly, to provide proper notice, to really have a nonadversarial program, we are just going to be spinning our wheels.

They have too many claims with too few people to do them. They need to do them right and you need to know how really long it takes and how many people are really needed. And I have talked to you about this. I think I talked to you in the 1980s and this is the same thing. This needs to be fixed. Blow it up, do something else with the work measurement system. It will help veterans. It will help the backlog overall because people will do it right even though it might take longer the first time. You will not have the hamster wheel that is running around now.

Mr. BILIRAKIS. Thank you, sir.

Anyone else wish to comment?

Mr. BLAKE. Mr. Bilirakis, I would say if you address a few of the concerns, I think that everyone here has outlined, the bill definitely makes a positive step forward in my mind anyway.

And I would also encourage you to go to the *Independent Budget* and check out some of the benefits recommendations that are outlined in far more detail that get a number of different things, whether it be in the compensation and pension side, whether it be all the way up into the appeal side and the Court as well. A lot of the things here that are addressed within the bill can certainly be reviewed in the *IB* as well.

Mr. BILIRAKIS. Thank you.

One last question, Mr. Chairman, of the entire panel.

How long is your service officer training? How do you develop your certification testing for your service officers and is it an open book test? I have always wondered that. Whoever would like to go first.

Mr. SMITHSON. Speaking for the American Legion, we have 2 yearly annual Department service officer schools that are conducted by the National Organization of the American Legion where our service officers in the field come in and receive training for a week.

The majority of their training is provided by their respective organizations, either their State or what we call in the American Legion language Department organization.

In keeping up with new VA requirements, we are testing all our accredited service representatives to ensure that they are still proficient and competent and this is in accordance to a new VA rule that was just passed.

And that test is a hundred question test. It is an open book test because obviously service officers in the field, when they are representing people, they have access to material and resources. We do not expect them to, you know, keep everything in their head.

But we are doing that and in the last few years, we have definitely moved in the direction of stronger oversight and proficiency requirements.

Mr. BAKER. The DAV has an 18-month training program initially when hired. Once that is complete, and that is fairly in depth, there is testing at various stages every 4 months. We work hand in hand with the VA's Voc Rehab to see that program through.

There is a fairly extensive test in the end. It is open book because we require our people to write the references, at least when I was administering the test. I am assuming they still do.

Once that 18 months is over with, all of our professional employees continue on a two-year testing program where we have two manuals. Basically we call them Book A, Book B. But each take a year to get through.

And each month, we take a section and train, whether it is musculoskeletal disabilities, in 1 month or various adjudication procedures if you are not talking about the actual rating schedule itself.

Each section is done over a month's period of time. You test at the end of the month. At the end of that first cycle, we test again and then we start the second book and do the same thing.

Once that is done, there is usually a brief break. Usually we update the training materials and then we start the whole thing over. And that is done throughout the career of our representatives.

Mr. BILIRAKIS. Anyone else.

Mr. HILLEMAN. The VFW maintains a career-long training program for our service officers. Generally a new service officer has a shadowing program where they work with a senior service officer.

Within that first year of employment, they are required to complete so many hours of training at a national level. At the national level training is between a week or two, depending on the training cycle.

And during the program, we contract with former VA employees who have worked in adjudication process who are recently departed from VA so we can get some of the most experienced people at a point in their career where their knowledge is the most current.

We offer three different stages of training, stage one, stage two, and stage three, depending on which part of your career you are in. If you are in your first 1 to 4 years, it is stage one. At year 4 to 12 you are in stage two and anyone beyond 12 years usually does stage three.

Mr. BILIRAKIS. Okay. Thank you very much. I appreciate it.

Mr. HALL. Thank you, Mr. Bilirakis for those insightful——

Mr. BILIRAKIS. I appreciate it.

Mr. HALL [continuing]. And crucial questions.

Mr. BILIRAKIS. Thank you.

Mr. HALL. I am sorry for almost overlooking you.

Mr. BILIRAKIS. No problem.

Mr. HALL. Once again, thank you to our panel. You are now excused. Enjoy the rest of your afternoon and thanks again for your hard work.

And we will ask our third panel to come up and join us at the witness table, Bradley G. Mayes, the Director for Compensation and Pension Service of the Veterans Benefits Administration, U.S. Department of Veterans Affairs; accompanied by Richard J. Hipolit, Assistant General Counsel, and Steven L. Keller, Senior Deputy Vice Chairman of the Board of Veterans' Appeals (BVA).

Gentlemen, thank you so much for your patience and for joining us.

Mr. HIPOLIT. Hipolit.

Mr. HALL. Okay. Sorry for mispronouncing it the first time.

Yes. Your full statement is entered into the record and you are recognized, Mr. Mayes.

STATEMENT OF BRADLEY G. MAYES, DIRECTOR, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY RICHARD J. HIPOLIT, ASSISTANT GENERAL COUNSEL, U.S. DEPARTMENT OF VETERANS AFFAIRS; AND STEVEN L. KELLER, SENIOR DEPUTY VICE CHAIRMAN, BOARD OF VETERANS' APPEALS, U.S. DEPARTMENT OF VETERANS AFFAIRS

Mr. MAYES. Okay. Thank you, Mr. Chairman, Ranking Member, there he is, Ranking Member Lamborn, Congressman Bilirakis, Members of the Subcommittee, thank you for the opportunity to testify today on the draft "Veterans Disability Benefits Claims Modernization Act of 2008."

As you noted, I am accompanied today by Richard J. Hipolit, Assistant General Counsel, and Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals.

I will get right into it here so we can get to the questions.

Section 101(a) of the draft bill would add PTSD to the statutory list of diseases that are presumed to have been incurred in or aggravated by service under certain circumstances. The presumption would apply to any veteran who engaged in combat with the enemy in active service during a period of war, campaign, or expedition, and who is diagnosed with PTSD.

The Department of Veterans Affairs does not support section 101 because this provision, as currently written, would eliminate that need for a link established by medical evidence between current symptoms and an in-service stressor.

And as the previous panel has mentioned, VA already has in place regulations that provide a lower threshold of evidence for substantiating a claim for PTSD in the case of a combat veteran.

Sections 102, 103, 104, 108, and 110 of the draft bill call for studies on readjustment of the rating schedule, the work credit system in use by VBA, the work management system in use by VBA, the use of medical health professionals in support of the VBA claims process, and the use of information technology in the claims process.

We do not support these sections because we do have already in place a contract for studies on quality of life, earnings loss, and transition payments. And the results of these studies should be due in August and could form the basis for a reform such as this legislation would require.

We currently conduct a work measurement study approximately every three to four years with the most recent study completed in November of 2007. We have access to Veterans Health Administration physicians in support of the VBA claims process.

And, finally, Ranking Member Lamborn, I know we have talked about this before. VA is in the initial stage of the acquisition process to engage the services of a lead systems integrator to assist in our business process modernization effort which I know this is getting at.

Section 105 would require VBA employees and managers who are responsible for processing benefit claims to take a certification exam.

Section 109 would add a new section 1156 to Title 38 United States Code (U.S.C.) getting at temporary ratings for unhealed or incompletely healed injuries.

Again, we think these are unnecessary. VBA already had a certification examination process for veteran service representatives and we are expanding that to include rating veteran service representatives.

Regarding section 109, we have authority under current regulations to award prestabilization ratings for all disabilities meeting the criteria that is in this legislation.

And, further, the review of all pending claims within 30 days after the date of enactment would be difficult using currently available resources.

Section 106 would amend 38 U.S.C. § 7731 to require VA to enter into a contract with an independent third-party entity to conduct an annual assessment of the quality assurance program required under that section.

VA does not feel that that is necessary. The Government Accountability Office, in a recent assessment of the Department of Defense disability evaluation system, referenced the VA Compensation and Pension Quality Review Program as a favorable model.

Having said that, we are very proud of that program, so we think that if someone did look at it, we would do fine.

Section 107(a) would add a new section 5109(c) to Title 38 U.S.C. requiring VA to take such actions as necessary to provide for the expeditious treatment of certain fully developed claims to ensure that any such claim is adjudicated not later than 90 days after submission.

Section 107(b) would amend 38 U.S.C. § 5103 to require VA as part of its notice to claimants of the information and evidence necessary to substantiate a claim, to provide the claimant with a check list, a detailed check list as we heard earlier from the previous panels.

We are already fast tracking the ready-to-rate claims. Further, we are worried that unrepresented veterans or veterans represented by Veteran Service Organizations might in some instances be disadvantaged by those rules.

And regarding 107(b), we do desire to improve the utility of our notice letters to the extent that the intention of the bill is to require a check list containing claim-specific information. We believe the provision may actually result in delayed claim adjudications and unnecessary litigation. And we are dealing with that now actually with the claim-specific notice.

I would like to, in the interest of time here, go on to section 111. Section 111 would add a new section 5121(a) to Title 38. It would provide that a person who under current law would receive accrued benefits based on the death of a claimant who dies while awaiting the adjudication of a claim be treated as the claimant for purposes of processing the claim. It does go into some other detail.

We do not object to this section, which would allow the submission of evidence in support of a claim that was pending before VA when the veteran died. Such legislation would be consistent with what the Veterans Disability Benefits Commission recommended, to allow survivors, not the creditor to pursue a veteran's due, but unpaid benefits.

And, finally, section 201, the single separation exam pilot study, we urge Congress to wait for the results of that pilot study before we move out on that.

And section 302 for the reasons cited in my written statement for the record, we would also oppose that section.

I would be happy, Mr. Chairman, Ranking Member Lamborn to answer any questions at this time.

[The prepared statement of Mr. Mayes appears on p. 66.]

Mr. HALL. Thank you, Mr. Mayes.

Well, I am glad you like section 111.

Mr. MAYES. Mr. Chairman, having said all that, actually, we are not that far off in some areas, I believe.

Mr. HALL. We all are, I assume, trying to do the same thing and you at the VA are a moving target, if you will, because while we are trying to respond to what we are hearing, you are also responding to what you are hearing and to what you are hearing that we are hearing.

Mr. MAYES. Yes.

Mr. HALL. So I am not surprised that there are things underway that you are advising us to wait for the results of.

But we have with regard to the stressor, the presumed stressor for PTSD, as you probably heard earlier, you know, this is the thing that we hear, that I hear about the most, and I think most Members hear not just in these legislative hearings, but in our work in our districts.

I certainly did not intend, I do not think we intended the language of this proposed bill to make it harder for a veteran to prove service-connection. We heard a couple of different suggestions for language that would correct that.

Is your suggestion that we leave the language of the existing law or did you like any of the options presented by the earlier witnesses?

Mr. MAYES. Well, I think what I would say on this matter, first of all, the discussion was very robust. It was a good discussion and I think everybody hit the issue.

You know, PTSD requires three things. It requires medical evidence diagnosing the condition. It requires credible supporting evidence that the claimed in-service stressor occurred and then a medical nexus between the two.

You know, the diagnosis is not a problem for us. The medical nexus really is not a problem for us. We get that from an examiner, from a psychologist or a psychiatrist. It is this issue of a stressor.

And the discussion so far has revolved around combat. And for veterans who engaged in combat, that is really not a problem either if we know that they engaged in combat. In fact, what we did was we took the statute. We took the definition of combat and we tried to come up with a way to nail that down because then the evidentiary threshold is lower for a veteran to prove a stressor. So if they engaged in combat, their lay testimony is good enough and then we move that case forward.

If you are asking me do I think that we need to change that, I mean, I think that is the issue really that you are dealing with. Do you want to expand? Do you want to expand combat to mean something other than engaging with the enemy?

And at this point, I would say we are executing the regs or the statute as it stands. And if that changes, of course, we would expand.

Mr. HALL. I will give you a couple of for instances. An Army Lieutenant who is serving in his first tour of two in Iraq and the initial assault on Fallujah and sees many of his comrades fall around him and sees extensive and graphic civilian casualties and upon return home has classic PTSD symptoms and has repeatedly been given a zero rating by the Regional Office. Then after two years of private psychiatric treatment during which time he is diagnosed as having an exaggerated startle reflex and suicidal tendencies and inability to sleep for more than a couple hours at a time and so on, comes to our office and we send one of our staff in with him and he gets a hundred percent rating and is granted back disability payment for the two previous years and an ongoing compensation.

I do not know what has to happen for that. Is this an issue of the training which—again, we are trying to deal with consistency of training and rating in this bill, and the fact that there seems to be at different ROs different ratings that come out for the same veteran. In fact, we have heard that from a number of sources, or is it something that can be dealt with in the service connectedness determination or the definition?

Mr. MAYES. Well, I think in that example that you just gave, first of all, it is unfortunate if we miss the evaluation, if we did not properly compensate the veteran up front. And we are doing lots of things to promote consistency and get it right the first time.

That is really a separate issue from the discussion about service connection for PTSD because it sounds like in that case, whatever the stressor was, whether it was a Combat Ribbon or possibly simply buddy statements and us corroborating that they were there, we granted service connection.

Mr. HALL. Right. There is no question about——

Mr. MAYES. Right.

Mr. HALL [continuing]. Combat in that case.

Mr. MAYES. Right. So they are in the system. Regarding the evaluation, I would say a couple of things. You know, one of the things that that Veterans Disability Benefits Commission said was you do need to look at the evaluation criteria for PTSD and for mental disorders.

And so we are doing that. We met with Social Security to see how they do it. We were headed down a path of possibly having separate evaluation criteria for multiple categories of mental disorders. Social Security breaks into two. We are still trying to figure out the best way to do that, but we think we are poised to make changes on the rating schedule with respect to mental disorders.

Mr. HALL. Excuse me, Mr. Mayes. Is the problem possibly the VA's overly narrow interpretation of § 1154 as outlined in the M21s?

Mr. MAYES. Well, in that particular case, we granted service connection. So, I mean, we——

Mr. HALL. It should be not applied.

Mr. MAYES. Yeah. That would not have applied.

Mr. HALL. Let us just take a for instance that was mentioned by one of the previous witnesses. What about a clerk who is driving in a convoy and a vehicle in front or behind is hit by an IED and they assist with rescuing people or even just see people in those difficult straits of being killed or wounded and the stress that comes about from that kind of situation?

Mr. MAYES. Well, we have a mechanism to arrive at service connection for PTSD in those cases.

If I could go back to § 1154(b), the provisions there, the way that regulation for that statute was structured and the regulations behind that statute were structured was that we would, if a person could demonstrate that they engaged in combat, then we would accept their lay testimony on its face. We would not have to go any further. And the statute is pretty clear. It says engaged in combat with the enemy.

So what we had to do was figure out how do we define engaged in combat with the enemy. And we did that in our procedures. We said if you get these medals or you have buddy statements or you outline facts that are consistent with those hardships. So we did through, procedure, try and make that definition.

Is that overly restrictive? I think what I would say is it is trying to interpret the spirit of the statute and the law.

Mr. HALL. Granted, that is well put. And I guess what I am hoping to do is to be more inclusive to the point where this week, for instance, people sleeping in the green zone where in October, I was told to go to bed and be careful not to use that water to brush my teeth, but use the bottle, you know now, this week, they are being told sleep in your helmet and your body armor because of the incoming rounds of mortar and rocket fire.

And there have been significant casualties, in the green zone. Somebody who is working there and is not—well, I guess you could say they are in combat with the enemy in that they are taking incoming rounds.

But what about stress from these kind—I mean, I have heard as you I am sure have also that diplomats and their staff and so on have been claiming to be suffering from PTSD symptoms from

being in Baghdad or being in Iraq in this circumstance and not knowing where the danger might come from, not knowing, not having a front or a rear as people in prior panels have said.

Service in OIF/OEF or other combat zones when there is a diagnosis and a claim being made that is backed up by a psychiatric examination and the veteran has been deployed to one of these—Mr. Abrams from the prior panel suggested unless there is proof that the stressor came from some incident that happened while not in the service or while not in combat should be granted.

Is that to your way of thinking a viable way of approaching this would be?

Mr. MAYES. Well, there are certainly many instances of stressors where someone would not have a Combat Ribbon. That scenario that you presented where someone was in a convoy, in our procedures now, what we would ask is, can you give us information about that circumstance.

And then we have a duty to assist, to go try and collect evidence to substantiate that assertion that I was in the convoy, I saw an IED explosion. So we will go out. We will ask for buddy statements.

For the recently returning servicemembers, we might call a unit historian and we will take their word for it and document on a report of contact that they corroborated this person was there and saw this. Again, that is good enough.

See, it does not have to be a combat stressor for us to grant PTSD. The whole purpose of 1154(b) was to say that if you could place someone in combat, then their statement alone is good enough. But if you cannot, we will still try and corroborate the stressor. And if we can and the examiner opines in their opinion that the stressor is the cause of the PTSD, then the grant is good.

Mr. HALL. Thank you, Mr. Mayes.

I am going to recognize our Ranking Member, Mr. Lamborn.

Mr. LAMBORN. Yeah. Thank you, Mr. Chairman.

I asked a similar question earlier, but I would like to ask you. If section 101 were to pass in its current form, what do you think would happen to the possibility of the backlog increasing or the possibility of more gaming of the system?

Mr. MAYES. Well, the way I read 101, it says we will presume a stressor if the veteran engaged in combat. So we will still be trying to chase down whether the veteran engaged in combat. The Agency will still have to have a definition of what combat is.

So, you know, on its face, I am not sure it would change a whole lot because you see as the discussion occurred today that is what is sometimes problematic when we do not have a Combat Action Ribbon or a CIB or what have you.

And I would add you do not even have to be near combat to be granted PTSD. I awarded service connection on a case one time for a Navy diver who was pulling bodies out the Potomac after the plane crash some years ago.

So, you know, the notion of combat, we are still going to have to try and run down whether they—you know, if they do not have the ribbon, were they in combat, and we would have to go get buddy statements just like we are doing today. But we are doing that today.

Mr. LAMBORN. Okay. Thank you.

Now, right now the VA has the authority under section 1154 to find that there is the engagement in combat with the enemy like we were just talking about.

One idea that I am playing with and talking to staff and Chairman Hall about is having a study done on how much the VA is actually using that or how it is using that.

What would be your thoughts on that possibility?

Mr. MAYES. A study to determine how frequently we apply § 1154(b).

Mr. LAMBORN. Yes.

Mr. MAYES. I think that, you know, that's certainly something that we could consider doing. I am trying to think. You know, typically what we would do is in the discussion that describes the reason for our decision, if we applied § 1154(b) in order to utilize a lay person's statement, we would lay that out in the reasons and bases. But I do not know that we capture that information in a distinct data field that we could then data mine. It would probably require us looking through cases that would be a workload issue for us to pull a sampling.

Mr. LAMBORN. Okay. Thank you.

And then a minute ago, you said that we are—by we, I mean yourself and the way the bill is currently drafted—fairly close on some things.

Where would those points of closeness be?

Mr. MAYES. Well, we are definitely, I think, very close on the provisions for accrued benefits claims. You know, I have said in previous testimony that we would definitely entertain continuing to develop a claim. Once we get an accrued benefits claim, continuing to develop for additional evidence for the claim that was pending at the time of the veteran's death. I think we are close there.

Frankly, I think that what we are doing with trying to bring on a lead systems integrator is getting at what you are interested in: leveraging technology to make some efficiency improvements.

Our contracting process is just painfully slow. You know, first, we have to develop a statement of work which we have actually pretty much completed and then the bid solicitation process, get the bid on the street, go through that competitive process.

But I have seen some of the work done on that. You know, I think within a reasonable amount of time with that assistance, we could have a plan that I think is headed in the direction that you are talking about with your proposed language, and I forget what section it is, but regarding automation.

Mr. LAMBORN. Any other sections of the bill that you see closeness to?

Mr. MAYES. Yes. I think as I alluded to in the studies, we are working with a contractor or we have engaged a contractor to study quality of life, earnings loss, and transition payments. That was referenced in the bill. And I believe those results are supposed to be available sometime in August or the September timeframe.

And myself and my staff have already met with the contractor. We are going to meet with them again to discuss quality of life.

I mean, we have provisions in our regulations right now under paragraph 28, paragraph 4.129 to allow us to pay veterans who have unhealed or incompletely healed injuries.

So when I say we are close, I actually think, you know, that legislation, we do not need it because it is there. We have authority to do it.

What you want us to do and we want to do it is get to the claims faster. I mean, it seems to me that is what it is about. And on the severely injured, I pulled some numbers, we are doing those in about 100 days as opposed to 182 days. And operationally we are putting an emphasis on the severely injured servicemembers and veterans.

The Disability Evaluation System process, that pilot is moving forward. So a lot of the things that are in here really we are underway with.

Mr. LAMBORN. Thank you.

And, Mr. Chairman, I yield back.

Mr. HALL. Thank you, Mr. Lamborn.

And, Mr. Mayes, as you heard, we have a vote called, so I will just ask you a couple more questions.

You know, the genesis of this temporary rating section is having heard about people who are not getting their claims paid for injuries not in dispute. They might have an eight-part claim and then maybe one part of it is a severe injury that is not in dispute, like an amputation or a TBI or something like that, and that the claim as a whole is being processed and they are going through the auditory and the vision and the various other aspects of it.

I asked Secretary Walcoff when he was testifying before the Subcommittee, why am I hearing about cases where this is not happening, why can we not just, if there is something as obvious as a leg amputation, like one goes to Iraq with two legs and comes back with one, can we not start paying immediately when the veteran presents a claim on that part of the claim that is not in dispute.

He said we do that. We can do that now. It is in the regulation just as you just said. And I said, well, then, why is it not happening, why are we hearing that is not happening. He said, well, because of bureaucratic confusion or certain claims processors who may feel that it is in their best interest in terms of the work credits and the guidelines for them to finish the whole claim first.

So there are two things that we are talking about doing here. One is by studying the credits that we may arrive at a situation where work credit would be given for early payment on the part of a claim which is not in dispute. And the other one is that we can get the veteran a flow of disability compensation going for him and his family, if he has a family, who may really need it.

We are only asking for things because we are hearing about them not being done.

By the way, we added one word there, healed or their injury healed, unhealed, or incompletely healed to allow for, for instance, an amputee who in Landstuhl has done a good job with rehabilitation and he or she comes back looking pretty much the way they are going to look. While the rest of their claim may take some adjudication, that is one thing that could be paid on a temporary basis as opposed to a prestabilization basis that part of the claim paid immediately while the rest of it is being processed.

Just curious what your reaction to that is.

Mr. MAYES. Well, I think I was here when Mr. Walcoff made that statement actually and it is true. We have the ability right now to adjudicate a claim right up front, do a temporary decision, and then continue to collect the evidence for all of the other issues.

The only thing I would say is there is attention. In the clear-cut case of an amputation, there is no reason we should not pay that right now, get the benefit stream started, and then collect the evidence on the other issues.

Frequently, though, the case is a little more complicated. We end up with a lot of evidence, much evidence in some cases, and a reference to other evidence, maybe private treatment records or, you know, we will go out for an exam.

And so there is that balance between reviewing all of that evidence up front to determine if we can do a partial rating, do the partial rating, then continue to collect all the evidence and do a second rating on that same case maybe, you know, 6, 8, 10, 12 months down the road.

And unless it is something obvious that sticks out, frequently they will go ahead and collect all of the evidence, get the exam, and just do one decision rather than two.

So that is the cost. That is the cost to do those temporary ratings is that you are really going to adjudicate that claim twice. And as you know, as you have mentioned here to us, we also have, you know, an inventory, a backlog. And so we are faced with the prospect of getting at that inventory and getting the benefits going. And there is a balance.

Mr. HALL. I understand that. But at the same time, if it is something that is visible, indisputable, medically proven, it is in the service record, it should not take any time really. It should not take much at all to say, okay, here is something that is clearly service related and it should be compensated for and let us just start——

Mr. MAYES. Yes, sir.

Mr. HALL [continuing]. Writing the checks. I mean, that does not seem to me like you are talking about more than an hour or something. Maybe I just do not understand. But I appreciate your input on it. And we are all after the same thing.

Mr. MAYES. Yes, sir.

Mr. HALL. And I think the better you and the ROs and the processors do that, which the Under Secretary says you now have the authority to do. I mean, we put the word in shall, the Secretary shall——

Mr. MAYES. Yes, sir.

Mr. HALL [continuing]. Because, you know, we were afraid that the authority is there, but is not being used. Show us that the legislation is not needed and, then maybe we will not put that in there.

I have a hard time, as you can imagine, as the veterans and their families have a hard time, and I understand it is maybe a small percentage of the time that this happens when it should happen more regularly.

But, anyway, we may have some other questions which we will submit to you in writing. Thank you for your patience.

Thank you to all the witnesses, thank you to all the staff, and we will keep working together to try to solve these problems.

Thanks to the VSOs and the other veterans advocacy groups for your support and have a good night.

This Committee is adjourned.

Mr. MAYES. Thank you, Mr. Chairman.

[Whereupon, at 4:19 p.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of Hon. John J. Hall, Chairman Subcommittee on Disability Assistance and Memorial Affairs

Good afternoon:

I would ask everyone to rise for the Pledge of Allegiance—flags are located in the front and in the rear of the room.

I am proud to be here today and honored to be joined by Ranking Member Lamborn in a bipartisan effort to present this historic legislation that will reform the VA Benefits Claims Processing System. This is in no way a unilateral effort. Many of the provisions within this legislation were independent bills offered by Members of this Committee on both sides of the aisle. I am confident that when it is voted on, it will leave this Committee as a seamless, fluid piece of legislation that will grant the wounded warriors of this great country the service they deserve.

I once read, "Veterans programs are not perfect. Much remains to be done by way of improvements along forward looking and constructive lines. The dominant problems are the carryover from past decades of a backward-looking pension philosophy and our failure to adjust the existing veterans' programs to fundamental changes in our society." I found this quote to be striking as it also captures my observations of the Veterans Benefits Administration, yet unfortunately those observations were made by Omar Bradley in 1956. We should have listened to the General then, but it is imperative that we do it now, especially since we have our troops in harm's way around the world.

The Subcommittee has conducted extensive oversight during this Congress and has listened to the testimonies of disabled veterans, their families, and survivors who explained their problems with VA benefits. Many of their concerns led back to issues with claims processing delays, denials, and avoidable remands. For a moment, I want to reflect on what they said, since these are the very people at the heart of this bill.

We've heard from a paralyzed veteran who went a year without compensation because of lost files and poor communication with VA that put his family in dire financial stress and forced his children to drop out of college. There were parents who talked to us about suicide and mental health problems and the inability of their beloved child to get VA healthcare—in many cases, service connection is necessary to accessing that care. Another veteran who suffered a Traumatic Brain Injury and an amputation, along with his wife, confronted us with how exhausting it is to figure out VA benefits and the gaps that exist because the model is outdated and archaic—even for a case that is so obviously clear cut and simple. It does not account for the loss in their quality of life, or their "real-world" needs.

And these atrocities are not just affecting veterans from current occupations. They affect veterans of every age and every conflict. I heard a story of a World War II veteran who had a mortar shell that landed directly in front of his face. He recalled the medic who attended him on the battle field and his difficulty in telling the difference between his burns and his facial hair. After being taken to a medical facility he then learned that this incident had never been reported by the medic. As a result, this brave soldier, who served his Nation in a time of dire need, had to fight the VA for 51 years before finally being awarded his benefits due to the requirements of finding witnesses of the event and the burden of proof that is all too often impossible or extremely difficult for veterans to both understand and complete. As he stood and told me this story, I watched as he grasped a folder that contained his disability claim and heard him state that he would never let it go in fear that the VA would rescind his claim and take back his money.

For too long the VBA has been allowed to skirt their responsibility to reward our veterans with the same type of selfless, heroic service that the veterans themselves gave to our country. However, reciprocity is at hand. The Veterans' Disability Benefits Commission, Dole/Shalala, and other task forces have all made recommendations to improve the system. We have data from the Institute of Medicine, the Center for Naval Analyses, the Institute of Defense Analyses, and several government

Accountability Offices and Inspector General Reports that highlight inconsistencies, variances, disparities, and errors. The Veteran Service Organizations have shared their ideas and experiences to reform VBA and have played an integral part in shaping this legislation.

Expert medical, legal, and technological witnesses have enlightened us on what is possible in our modern world. VA employees have also worked with us to tackle these problems and there is no doubt that this is a workforce dedicated to assisting disabled veterans. Unfortunately, they work in a broken, outdated environment. So, I am grateful to them, and everyone who has been willing to work with us on developing the improvements in this legislation.

With the Veterans Disability Benefits Claims Modernization Act of 2008, we hope to address the centric issues that have led to the enormous and mounting claims backlog, delays in processing, avoidable errors, inconsistencies in ratings and lack of accountability that amounts to a "system of injustice" for our veterans.

Title I of this bill encapsulates several sections that will:

- Address evidence problems with Post Traumatic Stress Disorder (PTSD) claims,
- Study, report, and implement a plan for readjusting the VA Schedule for Rating Disabilities so that it includes:
  - Medically recognized standards, codes and practices,
  - Appropriate compensation for the average loss of earnings capacity,
  - Quality of life impacts,
  - Mental health parity,
  - Encouragements for Vocational Rehabilitation, and
  - Creates an Advisory Committee on Disability Compensation.

It will also:

- Study the VBA Work Credit and Management Systems,
- Require certification and training for VBA employees and managers,
- Assess annually quality assurance,
- Expedite fully developed claims and require a checklist for evidence,
- Report on employing medical professionals at VBA,
- Assign Temporary Ratings for severely injured veterans while deferring other conditions,
- Enhance information technology that includes:
  - A Web portal for claim submission and tracking by veterans,
  - Rule base expert systems, and
  - Automated decision support.

Title I also contains provisions to assist survivors by allowing them:

- A year to submit additional evidence upon the death of a veteran, and
- To transfer the claim to another dependent.

Title II of this bill addresses the servicemember's transition from the Department of Defense to VA with the creation of a single VA/DoD disability evaluation examination process, whereby DoD determines fitness for duty and VA rates level of severity. This reduces the duplicity for injured and ill servicemembers who must navigate two different systems at a time when they need support and assistance the most.

Title III focuses on matters related to the United States Court of Appeals for Veterans Claims. It establishes annual tracking requirements for the Court's workload and gives the Court the authority to affirm, modify, reverse, or vacate, and remand decisions of the board. The Court must also first decide all assignments of error raised by an appellant for each benefit claimed.

Make no mistake—this is an ambitious, landmark piece of legislation which will take a great deal of cooperation and collaboration on multiple fronts. No doubt, this will need to be a collective effort that goes well beyond Congress and VA. It will require the support and expertise of the VSOs, DoD, leading experts and professionals, academics, and technicians, and other government entities, all of whom bring information and experience to the table. I know that VA is moving in the general direction of some of the efforts outlined in the bill, and I applaud your efforts in this vein—they are not overlooked.

Also, I do not want to fail to recognize the hard work and dedication of the VA employees throughout the VBA, from the Regional Office to the Central Office. I know that the problems we face today are the result of a culmination of events beyond their control, which run the gamut from inadequate funding and poor leadership to a corporate culture that does not foster accountability. Just as I have heard stories of calamity, I have also heard stories of the care and compassion of VA em-

ployees who genuinely care about our veterans and work tirelessly to provide them every service they can.

But today, time is of the essence and we must stop this incomprehensible cycle of ignoring the lack of accountability for outcomes of claims at the VBA. Outcomes matter, not just process. I repeat, outcomes matter, not just process and I believe that we need to modernize our Nation's claims processing system to make it accountable to producing better outcomes for our veterans, their families and survivors.

Ladies and Gentlemen, the time has come when we must envision a VA of the future, and not leave Omar Bradley's warning unheeded at the expense of another generation of veterans.

I now yield to Ranking Member Lamborn for his opening statement.

Prepared Statement of Hon. Doug Lamborn, Ranking Republican Member Subcommittee on Disability Assistance and Memorial Affairs

Good afternoon, thank you Chairman Hall.

It is an honor to participate in this momentous occasion.

The Veterans Disability Benefits Claims Modernization Act of 2008 still has far to go, but for the first time in a long while, I believe there is proper alignment of thought and a cooperative effort to make substantial improvements to the veterans' benefits claims process.

This bipartisan bill is comprised of a number of measures that have as their foundation, the collective recommendations of Democrats, Republicans, veterans' service organizations, and two blue-ribbon commissions on veterans' benefits.

That is not to say this bill is flawless or that there are not remaining snags to be worked out.

Indeed, there are a couple of issues that cause me difficulty, and one that I believe is critically flawed.

I will elaborate more on those concerns in a bit, but I want to preface those remarks with the fact that I wholeheartedly agree with the *intent* behind even the faulty provisions; still, I am deeply concerned about unintended consequences they may hold.

Principally, I am troubled over the provision that would have VA concede presumption of a stressor for every person who served in theater of operation that was subject to combat.

This could have enormous ramifications for the VA claims system and could potentially increase the backlog.

At the same time, I am empathetic to what the provision attempts to accomplish.

I believe an agreed upon solution can be reached, and I believe the expertise needed to arrive at such a fix is gathered here today.

My other concerns are less troubling, but I remain concerned about what might occur if we codify certain regulations and leave less discretion for VA.

I very much look forward to the testimony of our witnesses, especially VA's.

I hope that, based upon recommendations made here, resolutions can be reached and this bill will acquire the momentum it needs to make the potential historic impact it holds.

Chairman Hall, I appreciate the favorable rapport we share on this subcommittee.

And I eagerly anticipate working with you during the fleeting time left in this session to put some points on the board for veterans.

Thank you, I yield back.

Prepared Statement of Hon. William P. Greene, Jr.
Chief Judge, U.S. Court of Appeals for Veterans Claims

Mr. Chairman and Members of the Committee:

As the Chief Judge of United States Court of Appeals for Veterans Claims (the Court), I exercise responsibilities as the Chief Administrative Officer of the Court. It is in that capacity, and in the spirit of cooperation between the legislative branch and a national court of record that I join you today to present the Court's views on the proposed legislative changes concerning the Court that are offered in "The Veterans Disability Benefits Claims Modernization Act of 2008, HR____."

H.___Title III—§ 301—Annual Reports on Workload of United States Court of Appeals for Veterans Claims

Section 301 of the legislation proposes to add to title 38 of the U.S. Code a new section 7288 that would require the Court to submit to the Senate and House Committees on Veterans Affairs an annual report summarizing the Court's workload.

The Court's longstanding practice has been to produce an Annual Report on its workload. This report is provided routinely with the Court's budget request, and whenever requested by Congress. Additionally, the report is published on the Court's website, and permits the public to compare the Court's performance over the course of time. The Annual Report is modeled after the statistical report compiled and issued each year by the Administrative Office of the United States Courts. Indeed, our automated case-tracking system was designed to provide statistics modeled after that report, which are then compiled and reconciled by the Clerk of the Court. Our current reporting practice provides much of the data identified in the proposed legislation. The Court has responded and will continue to respond to appropriate requests regarding the Court's caseload, including the items in the proposed legislation. We leave to Congress' discretion whether codification of this practice is necessary.

H. ___Title III—§ 302—Modification of Jurisdiction and Finality of Decisions of the United States Court of Appeals for Veterans Claims

Section 302 of the legislation proposes to amend 38 U.S.C. § 252 by adding a new paragraph that reads: "(3) With respect to any appeal filed by a claimant, the Secretary may not make an assignment of error or concede an error not raised by the appellant, without first obtaining written consent from the appellant." It is my view that this provision has serious jurisprudential concerns requiring Congress' careful consideration.

First, although the amendment requires a veteran's consent to a concession of error by the Secretary, this provision presents potential ethical ramifications that must be considered before prohibiting an attorney, who is an officer of the Court, from identifying to the Court what is believed to be a prejudicial error in the Board decision on review. However, I leave it to the Secretary to address this consideration.

Further, requiring the Secretary to obtain written consent from an appellant not only will likely cause confusion for some appellants, especially those unrepresented, but almost certainly will contribute to delay in the legal review of all appeals. Timely appellate review by the Court is of great importance to veterans, VA, the Court, and Congress. And, as I have stated recently in a Congressional response, the most obvious and direct way to reduce the amount of time an appeal remains pending before the Court is for the parties to reduce the number of motions for extensions of time that are filed. In fiscal year 2007, the parties requested over 13,000 extensions of time to prepare and file the record, prepare and file the briefs, and to respond to attorney fee applications. Appeals cannot be submitted to the judges for decision until the parties have completed the briefing process. The legislative proposal requiring the Secretary to obtain written consent from an appellant before raising legitimate issues not already raised by the appellant is sure to add to the extensive number of motions for extensions of time that are filed with the Court. Additionally, if written consent is not secured, and the Secretary is precluded from bringing to the Court's attention errors not raised by the appellant that could be corrected "the first time", there is potential for repetition of that error if the matter is otherwise returned to VA for readjudication.

Finally, this amendment potentially creates issues involving post decisional matters. In an attorney fees application filed pursuant to the Equal Access to Justice Act, the Court must decide whether the Secretary's actions in the litigation were "substantially justified." Making this determination within a system that could prevent the Secretary from identifying potentially prejudicial errors would be extremely difficult. Further, I can anticipate that questions would arise as to whether a veteran waives an error and is precluded from later arguing it if he refuses to consent to its presentation by the Secretary.

Section 302 also amends section 7252(a) of title 38, United States Code, by mandating that the Court "may not affirm, modify, reverse, remand, or vacate and remand a decision of the Board without first deciding all assignments of error raised by an appellant for each particular claim for benefits." For the reasons discussed below, the Court believes such legislation is not necessary and indeed would slow down the Court's efforts to resolve appeals timely.

In conducting appellate review, the Court recognizes the well established concepts of employing judicial restraint and conserving judicial resources in determining

whether to address a particular argument when rendering a decision. Several factors are weighed in employing these concepts. Indeed, 38 U.S.C. § 7261(a) directs that the Court decide all relevant questions of law that are "*necessary to its decision and when presented*." To act within this mandate requires a balancing of interests by the Court. As observed by Chief Judge Posner in a concurring statement in *Rodriguez v. Chicago*: "It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both, when both types of ground are available. If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground; but if they are confident of the broad ground, they should base the decision on that ground (as well as on the narrow ground, if equally confident of it) in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law." 156 F.3d 771, 778 (7th Cir. 1998) (Posner, C.J., concurring). Similarly, at times, in deciding to not address certain allegations of error, judges of our Court have concluded: "A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board later rule against him." *Best v. Principi*, 15 Vet.App. 18, 20 (2001). The Court has also recognized that in certain instances it is prudent to address multiple arguments, and that a judge has discretion to "determine that, while it is not necessary, it may be appropriate to address multiple allegations of error in remanding a case." *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001).

The Court is aware that the practice of often deciding cases on the narrowest grounds has been discussed at length by practitioners in many venues, and the Court, through its opinions and in other settings (such as judicial question-and-answer sessions at the Court's Judicial Conference and its Bench and Bar Conference) has participated in this dialog. We are sensitive to this issue and have strived to respond to the concerns of the litigants who practice before us. As one of our judges stated at the Court's 2006 Judicial Conference: "I believe that the Court has listened to these comments and taken them to heart . . . [W]e are trying to reach more of the issues [raised on appeal]. But in certain instances, clearly jurisprudentially it makes more sense not to reach them."

I want to make clear that although the Court may not make a "decision" on every argument in every case, we do consider every assertion of error raised by the appellant and the Secretary, and give thoughtful deliberation on whether the Court's decision should specifically address that argument. Indeed, I can say with confidence that all of my colleagues are sensitive to the lengthy adjudication process that many veterans have endured by the time their appeals reach our doors, and my colleagues are cognizant of the wishes of both parties to have their arguments heard and considered. Other factors are at play, however, in determining whether it is necessary, appropriate, or prudent to expend resources and make binding determinations on particular arguments.

When conducting judicial appellate review, the Court, like all other appellate courts, does not engage in fact-finding; appeals must be considered based on a record established while the matter was pending before VA. Many errors argued to the Court are procedural in nature, and if persuasive and prejudicial, result in the Court vacating the Board's decision and remanding the matter to VA. A remand of this nature directs VA to correct the procedural errors, conduct additional evidentiary development on the claim that results from the correct procedure, and then, considering anew all of the evidence obtained and arguments raised, issue a new decision. Where such a remand has been ordered, often other allegations of error become factually moot, and even if persuasive afford an appellant no greater remedy than that which has already been secured—a remand of the matter with direction that VA readjudicate the claim. For example, if the appellant argues that the Board erred in failing to address a specific authority or piece of evidence, a judge can require that such evidence or authority be addressed on remand without deciding whether it was sufficiently raised or that it was error not to address it the first time. Or, if an appellant argues that he did not have an opportunity to submit to the VA adjudicator a particular piece of evidence, then he or she will have that opportunity on remand regardless of whether a judge decides it was error in the original decision.

Likewise, if an argument is persuasively made that VA failed to take required developmental steps or to notify a veteran of how to establish entitlement to benefits, the Court may vacate the Board's decision and remand the matter so that the error may be corrected and the record properly developed. There is no need to rule on other factual arguments that are based on an improperly developed record. Knowing that VA will reopen the factual basis upon which the claim will be adjudicated and issue a new decision based on all of the evidence, a judge may reasonably exercise his or her discretion in not making a specific determination on other arguments,

such as the sufficiency of the Board's analysis of the evidence. To do so would be to rule on a matter that would no longer have legal consequences because the Board's decision is no longer valid or useful to the determination. Therefore, it is my view that to statutorily require that the Court mechanically address "all assignments of error," regardless of their relevant weight or importance, would have an adverse affect on the Court's ability to manage its sizable caseload and to sustain a satisfactory level of production, and would be wasteful of Court resources with no benefit flowing to veterans. The principle of judicial restraint counsels that "when a court can resolve a case based on a particular issue, it should do so, without reaching unnecessary issues." *Black's Law Dictionary* (7th ed. 1999).

Moreover, there are certain arguments, such as Constitutional challenges, that courts deliberately do not reach unless necessary. For example, the U.S. Supreme Court recently reiterated that there is a "fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184 (March 18, 2008) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York and Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). Requiring the Court to decide all assertions of error would not only unnecessarily expend judicial resources, but could operate contrary to this principle or require us to make decisions beyond the bounds of the "case or controversy" requirement of Article III of the U.S. Constitution.

Further, I anticipate that defining when an argument has been raised, or sufficiently raised such that it must be addressed, could be problematic and result in confusion and disagreement. The legal content of appellate briefs filed with the Court, and particularly the numerous informal filings by unrepresented or pro se appellants, varies greatly, ranging from cryptic statements to lengthy submissions, and often the particular allegations of error are unclear. The Court endeavors to address the allegations that have merit and to clearly communicate to the parties why it is ruling in a particular way.

Finally, and very importantly, it must be recognized that although the appellant may believe that all of his or her assignments of error have merit, that belief may not be realized. As observed in *Best*, *supra*, if the Court rules that some of the errors raised have no merit, that determination is binding and those specific errors may not be raised in any remand otherwise ordered by the Court. Such a situation could work to the detriment of veterans, who would otherwise have the opportunity to develop and present any such arguments on remand. It could also cause potential further delay in the appellate review process because the appellant would have the right to contest that Court decision by appealing to the U.S. Court of Appeals for the Federal Circuit.

Simply stated, it is my view that section 302's proposed limitation on the Court's discretion to decide alleged assignments of error could have numerous unintended negative consequences for appellants and in the promptness of our judicial review. I assure the Committee that each judge strives to conduct judicial review responsibly and consistently, and thus I believe this amendment to 38 U.S.C. § 7252 is not necessary.

Conclusion

On behalf of the judges of the Court, I thank you for your consideration of our views on this proposed legislation.

Prepared Statement of Kerry Baker
Associate National Legislative Director, Disabled American Veterans

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to appear before you on behalf of the Disabled American Veterans (DAV) to address the "Veterans Disability Benefits Claims Modernization Act," (the "Act") under consideration today. In accordance with our congressional charter, the DAV's mission is to "advance the interests, and work for the betterment, of all wounded, injured, and disabled American veterans." We are therefore pleased to support various measures insofar as they fall within that scope.

Section 101 of the Act provides a presumption of service-connection for post traumatic stress disorder (PTSD) for veterans diagnosed with such and who engaged in combat with the enemy. The DAV fully supports this provision. However, the current high standards required by Department of Veterans Affairs' (VA's) internal op-

erating procedures for verifying veterans who engaged in combat with the enemy are impossible for many veterans of the current wars, as well as past wars, to satisfy. This is usually due to unrecorded traumatic events taking place on the battlefield, unrecorded temporary detachments of servicemembers from one unit to another while in a combat theater of operations, or simply poor recordkeeping. Our concern is that without defining who is considered to have "engaged in combat with the enemy," this provision will be rendered moot by VA's internal requirements.

If VA applied 38 U.S.C.A. § 1154 properly, the problems this Act targets, and others, would be resolved. Title 38, United States Code, section 1154(a) reads in part: "[I]n each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service. . . ." 38 U.S.C.A. § 1154(a) (West 2002). Likewise, section 1154(b) states:

> In the case of any veteran who *engaged in combat with the enemy* in active service . . . the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, *notwithstanding the fact that there is no official record of such incurrence or aggravation in such service*, and, to that end, shall resolve every reasonable doubt in favor of the veteran.

38 U.S.C.A. § 1154(b) (emphasis added). Specific to PTSD resulting from combat, the VA has determined that service connection requires (1) medical evidence of the condition; (2) credible supporting evidence that a claimed in-service stressor occurred; and (3) a link, established by medical evidence, between the diagnosis and the in-service stressor. 38 CFR § 3.304(f) (2007). section 3.304(f) appears on its face to be consistent with the statute by stating:

> If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

38 CFR § 3.304(f)(1).

It is quite evident that the provisions of the foregoing statute and regulation do not require validation by official military records of an in-service combat stressor. The law merely requires, absent "clear and convincing evidence to the contrary," "credible,' satisfactory lay or other evidence" of an in-service stressor that is "consistent with the circumstances, conditions, or hardships of the veteran's service." Congress made clear its intent of not requiring such proof to be in the form of official military records when it stated, "notwithstanding the fact that there is no official record of such incurrence or aggravation in such service." In cases of combat-related PTSD, the incurrence of the disability is the actual exposure to the event; therefore, requiring proof through official records of the incurrence violates the law.

Notwithstanding the plain language of the foregoing statute and regulation, the VA has circumvented the law by conducting improper rulemaking through its Office of General Counsel and its adjudication procedures manual, M21–1MR, by requiring the proof that a veteran engaged in combat as that shown through official military records, thus contradicting the intent of the statute. VA Office of General Counsel Opinion 12–99 reads in part:

> In order to determine whether VA is required to accept a particular veteran's "satisfactory lay or other evidence" as sufficient proof of service connection, an initial determination must be made as to whether the veteran "engaged in combat with the enemy." That determination is not governed by the specific evidentiary standards and procedures in section 1154(b), which only apply once combat service has been established.

VA Gen. Coun. Prec. 12–99 (Oct. 18, 1999). This General Counsel Opinion requires veterans to establish by official military records or decorations that they "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality." Further, VA has promulgated internal instructions that arguably go beyond the General Counsel's Opinion by instructing rating authorities as follows:

> Credible supporting evidence that an in-service stressor actually occurred includes not only evidence that specifically documents the veteran's personal participation in the event, but evidence that indicates the veteran served in the immediate area and at the particular time in which the stressful event is alleged to have occurred, and supports the description of the event.

M21–1MR, Part IV, Subpart ii, 1.D.13.

The M21–1 manual gives the following two "examples" to VA adjudicators considering whether a veteran has submitted sufficient evidence of an in-service combat stressor: "When considered as a whole, evidence consisting of a morning report, radio log, and nomination for a Bronze Star may be sufficient to corroborate a veteran's account of an event, even if it does not specifically include mention of the veteran's name." The second example states: "Unit records documenting the veteran's presence with a specific unit at the time mortar attacks occurred may be sufficient to corroborate a veteran's statement that she/he experienced such attacks personally. These examples go beyond what is required by statute and regulation. By VA requiring official records to prove the "incurrence" of a disease or injury—the in-service stressor serving as the incurrence, or injury, in the case of PTSD—the VA has effectively read "satisfactory lay or other evidence" out of the law, thereby exceeding its authority.

For decades, the VA has required such proof before recognizing a claimant as a "combat veteran." As a result, those who suffer a disease or injury resulting from combat are forced to provide evidence that may not exist or wait a year or more while the VA conducts research to determine whether a veteran's unit engaged in combat. Many claims that satisfy the requirements of the statute are improperly denied.

Chairman Hall, the DAV believes your bill would better deliver its intended effect if it amends title 38, United States Code, section 1154(b) to clarify when a veteran is considered to have engaged in combat for purposes of determining combat-veteran status. In the alternative, the Act could be amended to define under title 38, United States Code, section 1101, who is considered to have engaged in combat with the enemy. Such clarification would hopefully allow for utilization of nonofficial evidence—such as a veteran's statement alone if the statement is "credible" and "consistent with the circumstances, conditions, or hardships" of the veteran's service and is otherwise not contradicted by clear and convincing evidence—as proof of an in-service occurrence of a combat-related disease or injury, to include PTSD.

This type of legislation would remove a barrier to the fair adjudication of claims for disabilities incurred or aggravated by military service in a combat zone. This legislation would follow the original intent of the law by requiring VA to accept as sufficient proof lay or other evidence that a veteran engaged in combat with the enemy as well as suffered a disease or injury as a result of that combat if consistent with that veteran's service.

Many veterans disabled by their service in Iraq and Afghanistan, and those who served in earlier conflicts are unable to benefit from liberalizing evidentiary requirements found in the current version of the applicable statute, section 1154; and regulation, section 3.304(f). This results because of difficulty, even impossibility, in proving personal participation in combat by official military documents.

Oversight visits by Congressional staff to VA regional offices found claims denied under this policy because those who served in combat zones were not able to produce official military documentation of their personal participation in combat via engagement with the enemy in light of VA's persistence to exceed statutory and regulatory requirements. The only possible resolution to this problem, without amending section 1154 or otherwise defining who is considered to have engaged in combat, is for the military to record the names and personal actions of every single soldier, sailor, airman, and Marine involved in every single event—large or small—that constitutes combat and/or engagement with the enemy on every battlefield. Such recordkeeping is impossible.

Numerous veterans have been and continue to be harmed by this defect in the law. In numerous cases, extensive delays in claims processing occur while VA adjudicators attempt to obtain official military documents showing participation in combat: documents that may never be located. Notwithstanding the possible passage of this bill, without codifying who is considered to have engaged in combat, the VA will continue to apply criteria that unlawfully exceed regulatory and statutory authority. By doing so, this veteran-friendly bill will have no practical effect because VA will continue to deny claims of service connection for PTSD when veterans are unable to prove combat experience in accordance with VA's stringent *internal* requirements.

In regards to section 102 of the Act, the DAV fully supports an adjustment to the VA Rating Schedule that ensures parity with mental health disabilities and physical disabilities. The current disparity exists because of the Rating Schedule's requirement that a veteran suffer from total occupational and social impairment prior to an award of a 100-percent disability rating. VA decision makers generally focus only on occupational skills when considering such ratings and therefore fail to consider all other aspects of life. This type of disparity can result in a veteran that is 100 percent socially impaired, even to the point of being unable to maintain close family relations that results in an isolated life, being denied a total rating by VA because

the veteran may be able to earn a living from home. Any change to the Rating Schedule should definitely consider these disparities and seek to resolve them in favor of disabled veterans.

There are various possible solutions to this problem. For example, if VA required total occupational impairment "*or*" (rather than "and") social impairment; or more preferably, "*near*" total occupational impairment "*or*" "*near*" total social impairment, then inequities between ratings for physical and mental disabilities would be resolved.

Concerning the study required by this section, one that considers using codes in use by the medical and disability profession, we caution that ICD codes be carefully implemented. There are well over 10,000 of these types of medical codes, but just over 700 current VBA diagnostic codes. Therefore, a diagnostic code-ICD code cross reference would be a required tool in the simplification process of this type of transformation.

As DAV has stated on the congressional record, we support the establishment of an advisory Committee as a first priority to begin oversight of any updates and/or adjustments to the Rating Schedule. The DAV requests that we be ensured easy access to the advisory Committee once formed.

We currently fail to understand the significance between (c)(1), submission of a plan, and (c)(3)(A), report on plan. These requirements appear redundant; we are therefore requesting clarification. On this note, we also fail to understand the need for the additional studies and reports requested of this portion of the Act. The VA is currently in the process of conducting various studies recommended by recent commissions, such as a quality of life study to include updates to the Rating Schedule. It may be more prudent to review the results of these studies before implementing additional and overlapping studies. There is also the likely chance that the current ongoing studies will be completed by the time this Act moves far enough through the legislative process to become law.

Finally, we have reservations with section (b)(2)(B), which requires a study on the "nature of the disabilities for which compensation is payable under laws other than laws administered by the Secretary." This provision appears, at least on its face, to compare service-connected disability compensation to private disability programs, i.e., workman's compensation. Disabilities incurred on the battlefield or during military training are not tantamount to the typical on-the-factory-job repetitive motion injury. Nonetheless, some disabilities acquired as a result of military service will have overlapping symptoms of disability caused by civilian occupations. The VA, however, provides a set of benefits that are uniquely pro-claimant and veteran-friendly—benefits provided by a Nation grateful to those that stand up to defend it. These benefits should not be comparable to workman's compensation or Social Security.

Section 103 of the Act focuses on the VA's work credit system and section 104 requires a study on the work management system. The DAV has long advocated for a more stringent system of accountability. We therefore do not oppose the purpose behind these sections of the bill. However, we feel that any improvements in the work credit system, aimed at increasing accuracy and accountability, will be less than effective if equal or coinciding changes are not made in VA's quality assurance practices in conjunction with those of the work credit system. With careful and well-planned changes, the VA's quality assurance system, the Systematic Technical Accuracy Review (STAR) program, can serve its purpose of overseeing accuracy much more effectively and simultaneously serve as a tool to implement an accountability program.

In the STAR program, a sample is drawn each month from a regional office workload divided between rating, authorization, and fiduciary end products. For example, a monthly sample of "rating" related cases generally requires a STAR review of "10" rating-related end products.[1] Reviewing 10 rating related end products per month does not amount even to a tenth of 1 percent of the rating decisions produced in many average-sized regional offices. This should serve as an example of the lack of importance placed on accuracy. For this reason, DAV fully supports the intent of the legislation at hand.

As for the issue of suspending the award of work credits if VA fails to implement a new system, this may be unfeasible. Suspending work credit fails to consider the reality of how multifaceted the VA's benefits delivery system has become, particularly when considering the various types of claims a beneficiary may file, the various stages of development and decisionmaking within each claim, and the potential changes that can occur at any particular stage of the claim. Suspending work credit may render the VA unable to account for accuracy at every stage in the process,

[1] *See* M21–4, Ch. 3, § 3.02.

particularly those non-rating actions performed by claims developers, adjudicators, authorizers, etc, whose work credit is fixed to the claim but not necessarily to the rating decision.

Currently, VA utilizes over 50 pending end-product codes[2] for a multitude of actions. The number of end-product codes may be further expanded by using "modifiers" that designate specific "issues" for types of claims within a certain broader category. The VA's end product codes are used in conjunction with its productivity and work measurement system. The productivity system is the basic system of work measurement used by Compensation and Pension (C&P) Service, but it is also used for report and tracking. Additionally, VA's end-product codes are also utilized in the STAR program. This further supports the notion that these two systems should be improved simultaneously in order for any improvements to be effective.

The program is also used for quantitative measurement, a tool utilized in preparing budget forecasts and in distributing available staffing. Quantitative and productivity measurement are also tools used in comparing and tracking employment of resources. Both productivity measurement and work measurement are tools available to management for this purpose. Quantitative measurement also allows Central Office and Area Offices to compare stations and to track both local and national trends. Productivity measurement and work measurement are complementary measurement systems that each depend, in part, on VA's end product code system. The end-product code system is further used in determining work credit provided to VA's employees. The work credit function of these programs would have to be disconnected, if possible, from the remaining function of the programs; or else, the VA would lose the ability to manage and track its day-to-day functions.

Based on the foregoing, we feel the legislation as written, does not take into account the significant interplay between VA's work credit system, which utilizes completion of pending end-product codes, and the foregoing measurement systems and STAR program, which also utilize completion of pending end product codes. Nonetheless, because of the positive intent of this legislation, the DAV would welcome the opportunity to discuss this issue in more depth. We would look forward to working hand-in-hand with Congress, as well as any necessary VA officials, in order to help achieve an outcome that satisfies the intent of Congress, improves the lives of disabled veterans, and assists VA in the success of each.

Section 105 of the Act would create a required certification for employees of the Veterans Benefits Administration (VBA) responsible for processing claims. We have long-advocated for better training in VBA and therefore fully support this portion of the bill. The DAV has maintained the preeminent training program throughout the VSO community for many years; of which, many other organizations have adopted. Training is tied directly to quality—the DAV would welcome the opportunity to assist the VA in developing such a program.

Section 106 requires an assessment of VA's quality assurance program. For this section, please refer to our discussion on sections 103 and 104 of the Act.

Section 107 of the Act expands authorization for developing, submitting, and certifying a claim as fully developed. The DAV understands the need for novel initiatives that have the possibility of assisting VA with, or providing VA with the tools for, expediting the claims process. Nonetheless, we have concern as to whether this is the correct tool.

The reality of claims development is that the vast majority of claims submitted, with the potential exception of claims for discharging servicemembers, requires access to internal and external developmental tools. Some of these tools include access to, and authorization to use intra and inter agency communication platforms that are necessary to request records from sources such as the Social Security Administration, Department of Defense, and the Veterans Health Administration. Currently, veterans service organization representatives, whether local, state, or national do not have access to these systems because limitations based on representation (power of attorney) are not built into the software.

However, what is more concerning to us than technological and logistical limitations is the proper training required to thoroughly understand what constitutes a fully developed claim. VA adjudicators are usually well versed in the particular and varied details surrounding claims development, but only after extensive on-the-job experience. Nonetheless, the majority of appealed cases remanded by the Board of Veterans' Appeals ("BVA" or "Board") are because of errors committed by VA in its duty to assist claimants in the development of their cases.

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[2] M21–4, App. A, Glossary of Terms and Definitions. *Manpower Control and Utilization in Adjudication Divisions* (Pending End Product: "A claim or issue on which final action has not been completed. The classification code identified refers to the end product work unit to be recorded when final disposition action has been taken.").

We fear that this remand rate would increase with the addition of potentially unqualified individuals to the claims development arena. This is not to indicate that we are absolutely opposed to any plan that would allow personnel other than VA employees to assist in the development of claims, but only to express our concerns regarding the current barriers to success of such an idea.

Section 108 of the Act requires a study and/or report on employing medical professionals to assist VBA. Based on our comprehensive experience in the claims process, one that dates back to a time when the VBA and the BVA employed medical professionals in the claims process, the DAV must oppose this section of the bill.

The many complications involved in the claims process do not include VA decisionmakers facing many challenges interpreting the medical data involved in the decisionmaking process. The biggest challenges facing VA decisionmakers result from inadequate legal training, not inadequate medical training. Misunderstandings of law account for far more errors than do misunderstandings of medicine.

Additionally, integrating the medical and legal segments of the claims process will ultimately ensure the disappearance of any distinction between the two. Medical professionals are not legal professionals and therefore should be restricted to and held accountable for accurately reporting medical facts.

Section 109 codifies the use of pre-stabilization ratings. The DAV does not oppose codification of pre-stabilization benefits. However, Congress should include provisions for extending such ratings when a veteran is not shown to have stabilized within the specified time.

Section 110 concerns the use of information technology at VBA. A reasonable approach would be to enact legislation that requires VA to submit to Congress a broad and over-arching plan by a reasonable date outlining the technology identified and the manner in which such technology would be utilized. Once this plan is complete, the groundwork will be laid for VA to coordinate with various entities, i.e., Congress, Veterans Service Organizations, Department of Defense, etc., in order to begin turning the plan into reality on a larger scale. The DAV would welcome the opportunity to work with the Agency, to include any contractors, in order to assist in the development of an electronic claims process system.

The goal of any form of electronic claims process should be to automate, and thereby shorten as much as possible those portions of the claims process that currently consume the majority of time. Expecting a form of technology to imitate intelligent human behavior with respect to the decisionmaking process of VA's benefits delivery system, particularly where evidence weighing and judgment calls on such evidence are required, appears as an untenable goal—automation rather than human imitation is the first logical phase of this undertaking.

Contrary to some beliefs, the majority of time spent by VA on disability claims is in preparing the case for a decision. This includes receiving the claims by VA, establishing the claim in VA's current computer systems, and developing the evidence to support the claim. Evidence development, whether in the form of gathering military records from the service department or the Records Processing Center, private health records, VA health records, VA or private medical opinions, and stressor verification through the U.S. Army and Joint Services Records Research Center consumes the vast majority of the claims-processing time. Therefore, any viable electronic claims-processing system implemented with real expectations of shortening the claims process must focus on all VA functions and development leading up to the rating decision more so than just the rating decision itself.

The DAV supports the provisions of section 111 that pertain to the management of claims for accrued benefits upon the death of a claimant. We do not, however, support the portion stating that the substituted party may designate the person who receives benefits if such party does not want to be a claimant. The codification should merely follow the regulation.

Section 201 creates a single joint VA and Department of Defense disability examinations process. The DAV supports this provision, for which a pilot program is currently being conducted.

Section 301 increases reporting requirements of the United States Court of Appeals for Veterans Claims (Court), and section 302 modifies the jurisdiction of the Court. Each of the forgoing provisions is nearly mirrored in the Independent Veterans Service Organizations, *Independent Budget* for FY 2009. We strongly support each and commend Chairman Hall for their recommendation.

Prepared Statement of Ronald B. Abrams
Joint Executive Director, National Veterans Legal Services Program

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to submit this testimony on behalf of the National Veterans Legal Services Program (NVLSP). NVLSP is a nonprofit veterans service organization founded in 1980 that has been assisting veterans and their advocates for 27 years. We publish numerous advocacy materials, recruit and train volunteer attorneys, train service officers from such veterans service organizations as The American Legion and Military Order of the Purple Heart in veterans benefits law, and conduct quality reviews of the VA regional offices on behalf of The American Legion. NVLSP also represents veterans and their families on claims for veterans benefits before VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other Federal courts. Since its founding, NVLSP has represented over 1,000 claimants before the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims (CAVC). NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

TITLE I: *Modernizing The VA Claims Adjudication System*

Section 101. Presumption of service-connection for veterans who were deployed in support of contingency operation with post traumatic stress disorder

Section 101 would establish a presumption of service connection for veterans who were deployed in support of a contingency operation who now suffer from post traumatic stress disorder (PTSD). Proposed subsection (d), which would be added to 38 U.S.C. § 1112, states:

> For the purposes of section 1110 of this title, and subject to the provisions of section 1113 of this title, in the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, and who is diagnosed with post traumatic stress disorder, such disorder shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disorder during the period of service."

In essence, section 101 would permit veterans who have been diagnosed with PTSD to obtain service connection if they can prove that they engaged in combat with the enemy. It is NVLSP's experience that veterans who can prove that they engaged in combat with the enemy have much less trouble establishing service connection for PTSD than veterans who cannot prove they engaged in combat with the enemy. See 38 U.S.C. § 1154(b), and 38 CFR § 3.304(f). Therefore, although well intentioned, proposed section 101 would have very limited positive impact.

In Iraq and Afghanistan there really is no specific front or rear area. No service Member is really safe in either place and just about everyone is subject to enemy attacks and exposure to events that threaten their physical safety or the physical safety of others. Therefore, NVLSP suggests that section 101 be redrafted to establish a presumption of service connection for PTSD if the veteran served on active duty in Iraq or Afghanistan and currently suffers from PTSD, unless there is clear and convincing evidence that the veteran's PTSD is caused by a stressful event that did not occur during a period of military service, notwithstanding the fact that there is no record of evidence of such disorder during service. NVLSP also suggests that this same presumption extend to veterans who did not serve in Iraq and Afghanistan, but did serve in a combat zone during active duty. Please note that under NVLSP's proposals, to be entitled to service connection for PTSD, these veterans would still have to be diagnosed with PTSD and the mental health expert would still have to link the current condition to an in-service stressor.

It is the experience of NVLSP that the VA spends a great amount of time trying to verify alleged stressors that sometimes are impossible to confirm. If the law were changed to acknowledge that service in Iraq and Afghanistan and service in a combat zone constituted a stressor for PTSD purposes, veterans who claim service connection for PTSD would have a much easier time obtaining their rightfully earned benefits and the VA would not have to spend so much time developing claims for PTSD.

Section 103. Study on Work Credit System of Veterans Benefits Administration

Section 103 requires the VA to conduct a study of the work credit system of the Veterans Benefits Administration (VBA). VBA uses this system to measure the work production of employees of the Veterans Benefits Administration. NVLSP believes that this study is long overdue. NVLSP supports this study and suggests that the study be performed by the Government Accounting Office (GAO) not the VA. Having the VA study the impact of its work measurement system is like having the fox evaluate the effectiveness of henhouse security.

As NVLSP has previously stated, the current VA work credit system prevents the fair adjudication of many claims for VA benefits. The current VA work credit system needs to be overhauled because the current system rewards VA managers and adjudicators who claim multiple and quick work credit by not complying with the statutory duties to assist claimants obtain evidence that would substantiate their claims and notify claimants of what evidence would substantiate their claims.

No matter how much the average VA employee tries to help the claimant population, the VA decisionmaking culture, created by the VA work measurement system, prevents many VA adjudicators from doing a good job. The VA has created a work measurement system for deciding critically important claims that is driven by weighty incentives to decide claims quickly. How the VA measures its work and evaluates the performance of its employees has had a major impact on the adjudication of claims for veterans benefits.

Each year, after a complicated process involving the executive branch and Congress, the VA is given its budget. The budget can be defined as the resources available to the Secretary of Veterans Affairs to be used to accomplish the mission of the VA. Managers at different levels within the VA are then given their allocation from the overall VA budget. This allocation is determined by the workload and performance of the various VA components. For example, the money budgeted to a VARO determines how many workers can be hired or fired, how equipment is maintained, and what new equipment can be purchased.

Claims received in VARO are described as "pending issues." These claims are assigned an "end product code," alternatively described by the VA as a unit of work. When final action is taken on a pending claim, or pending issue, the regional office (and eventually the VA) receives a credit.

End products are assigned values based on the average number of work hours it takes an employee or group of employees to complete all action necessary for that type of claim. Each end product code has a different value. For example, VA managers receive more credit for work completed on an original claim than they do for adjusting the income of a current pension beneficiary. No matter how much work the VARO does on an individual claim, however, it receives as credit only the value that is provided for the end product code assigned to that particular type of pending claim. Therefore, VA managers receive the same credit whether or not the claim is granted or denied or whether the claim takes the VARO 1 day or 2 years to decide.

VA manuals describe the end product system as a "management tool" and indicate that its measure should not be used to evaluate individual performance. As is the case with many management information systems, however, the measurement system tends to drive what and whom it measures, rather than the converse. VA managers are evaluated by how many end products they produce, how quickly they can take credit for end products, how many employees they need to produce these end products, and last, the quality of the work in the office they manage. Because it is in the best interest of the VA managers to complete as many cases as quickly as they can, the interests of VA managers in many cases stands in opposition to the interests of claimants for VA benefits.

Responsibilities of VA managers that protect the fairness of the adjudicatory process—such as "control" of claims, supervisory review of unnecessarily delayed claims, thorough development of the evidence needed to decide a claim properly, recognition of all of the issues involved, provision of adequate notice, documentation that notice was given, and careful quality review—all adversely affect the productivity and timeliness statistics (that is, how many decisions on claims are made final within a particular period of time) for the VA manager. Consequently, proper attention by VA managers to their legal obligations very often adversely affects the statistics upon which their performance is rated.

Fixing the VA work credit system is a topic that is near and dear to my heart. I have been involved in various aspects of veterans law for over 30 years. My experience tells me that unless the system is corrected most attempts to improve VA claims adjudication will not be successful because the driving force in VA adjudication will not be fair and accurate adjudications—but—the need to claim quick work credit.

Section 104. Study on Work Management System

Section 104 requires the VA to conduct a study of the VA work management system. NVLSP supports this study.

According to the VA Monday Morning Workload reports, in early January 2006 there were 532,228 total claims pending adjudication at the VA regional offices (VAROs). In early January 2007 there were 603,104 total claims pending adjudication at the VA regional offices (ROs). In early January 2008 there were 647,478 total claims pending adjudication at the VA regional offices (ROs). These VA statistics reveal that the VA admits that there are now 115,250 more claims pending adjudication at the ROs in 2008 than there were in 2006. This is an increase of over 21 percent in just 2 years.

If this trend continues the VAROs will have over 947,000 backlogged claims in just 4 years. NVLSP believes that the current size of the backlog is obviously unacceptable and allowing that unacceptable number to grow by 200,000 cases in just 4 years would be insulting to veterans.

Why Is There Such A Large Backlog

In the opinion of NVLSP, the major cause of the VA claims adjudication backlog is a VA work credit system that prevents the fair adjudication of many claims for VA benefits generating extra work for the VA and major problem for claimants. Also, the inadequate quality of many VA adjudications and the inadequate number of trained adjudicators contribute to the size of the backlog.

The Impact of Judicial Review

The VA claims processing (or claims adjudication) system has been exposed by judicial review. To say there is a crisis in VA claims adjudication is an understatement. Statistics from the Board of Veterans' Appeals (BVA) and the U.S. Court of Appeals for Veterans Claims (CAVC) show that nationally, for FY 2007, over 56 percent of all appeals decided by the BVA were reversed or remanded and over 63 percent of CAVC decisions on the merits were reversed, or remanded. In fact, some VAROs were even worse than the national average. Over 60 percent of the appeals from the New York RO and over 62 percent of the appeals from the St. Petersburg Florida RO were reversed or remanded by the BVA.

Based on the experience of NVLSP (over 10 years of quality reviews, in conjunction with The American Legion, of approximately 40 different VAROs combined with extensive NVLSP representation before the CAVC), most of the most egregious VA errors are a result of premature adjudications. For example, many errors identified by the Legion/NVLSP quality review teams reveal that VA adjudicators failed to even try to obtain evidence that could substantiate the claim, and incorrectly accepted and prematurely denied claims based on inadequate evidence (especially inadequate VA medical examinations).

Most premature VA adjudications are caused by ROs seeking work credit. If the claimant should appeal, the RO can earn another work credit for work to process the appeal. The VA manager gets to claim three unearned work credits and to show an erroneously low time period to adjudicate these claims. That would help the manager earn a promotion and a bonus for such "productive" work. NVLSP has been repeatedly informed by a variety of current and past VARO officials that because of pressure to produce end products and reduce backlogs, they intentionally encourage the premature adjudication of claims. This statement is also based on my experience as a VA employee, and based on my experience as a member of the Legion/NVLSP quality review team.

Section 107. Expedited Treatment of Fully-Developed Claims and Requirement for Checklist to be provided to Individuals Submitting Incomplete Claims

Although NVLSP generally supports expediting VA decisionmaking, NVLSP opposes section 107, as written. It creates an alluring, but treacherous trap for the hundreds of thousands of VA claimants who have not mastered veterans benefits law and the evidence that is in their VA claims files. It is very rare that a VA claimant will know enough about the law, the evidence that is already in his or her VA claims file, and the evidence that is not already in the VA claims file but is possessed by VA Medical Centers, other federal agencies like the Social Security Administration, and private physicians, to be able to state in a knowing and intelligent way that "no additional information is available or needs to be submitted."

This is true even if VA provides the claimant in advance with the checklist contemplated by section 107. The VA currently provides boilerplate notice under section 5103(a) of Title 38 of the information and evidence that a claimant needs to submit to substantiate the claim. The VA has consistently resisted judicial decisions requir-

ing it to tailor section 5103(a) to the individual circumstances of the claimant's case, as Congress intended. Moreover, the boilerplate notice is often inaccurate, missing important information, and confusing to most VA claimants given the complexity of veterans benefits law. As worded, VA would plainly interpret the checklist provision in section 107 to allow it to use similar, confusing boilerplate language that is not tailored to the circumstances of the individual's case and does not take into account the impact of the evidence already in the VA claims file and what particular evidence is lacking that would be necessary to submit to support an award of benefits.

But section 107 would certainly prove attractive to most VA claimants. The allure of a guarantee that the claim will be decided in 90 days will likely influence many unwary claimants to make an unknowledgeable statement that "no additional information is available or needs to be submitted" in exchange for a quick decision. The future consequences of making this statement is not, but should be addressed in section 107. What happens if the expedited claim is denied? Does the statement that "no additional information is available or needs to be submitted" waive the claimant's right to later complain that VA did not, but should have obtained additional information? Does the claimant have a right later to submit additional evidence if it turns out the claimant was wrong to state that "no additional information is available or needs to be submitted." Is VA required to comply with current sections 5103 and 5103A of Title 38 before the expedited claim is decided. Is VA required to comply with these current provisions after the expedited claim is denied. All of these questions would need to be answered in a satisfactory manner before NVLSP could support section 107.

Section 108. Study and Report on Employing Medical Professionals to assist Employees of Veterans Benefits Administration

NVLSP supports hiring medical professionals to advise VBA employees. We are also pleased that the legislation specifically states that these medical professionals shall not be employed to rate claims. NVLSP suggests that language be inserted into this section that requires these medical professionals to respond only to written questions with a written response that must be placed in the claims file. Without a paper trail, it would be far too easy for the medical professionals working with lay adjudicators to dominate the claims adjudication process.

Section 109. Assignment of Temporary Disability Ratings to Qualifying Veterans

The proposed statute closely follows 38 CFR § 4.28 (2008). This regulation currently provides that a veteran may be assigned a 100 percent rating if he or she suffers from an unstabilized condition that was incurred in service resulting in severe disability that makes substantially gainful employment not feasible or advisable. The 50 percent prestabilization rating is appropriate for an unstabilized condition manifested by [u]nhealed or incompletely healed wounds or injuries where material impairment of employability [is] likely.

NVLSP supports the proposed statute but suggests that language be inserted that makes it clear that veterans who suffer from mental conditions are eligible for temporary disability ratings. Also, we note with approval that the statute provides the VA the authority to extend, if appropriate, the temporary rating beyond the termination date and that the VA is required to review all pending claims to determine whether the claimant is entitled to a temporary rating.

Section 111. Treatment of Claims Upon Death of Claimant

NVLSP strongly supports section 111, but believes certain changes should be made to the statutory language. First, the third line of new section 5121A should be amended to add more precision; this section should cover cases awaiting decision by a VA regional office, the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims, or other reviewing court. Second, the phrase "processing the claim" (used twice in the section) should be amended to read "processing the claim or appeal."

TITLE II

Section 201. Creation of Single Joint Department of Veterans Affairs and Department of Defense Disability Examination Process

NVLSP strongly supports what appears to be the ultimate goal underlying Title II of the proposed bill. A large number of military personnel are medically discharged each year as a result of a determination by a military Physical Evaluation Board (PEB) that the individual is unfit for continued military service due to certain physical or mental disabilities. But as described briefly below, the Federal Govern-

ment has for decades used a wasteful, redundant, and unfair system for evaluating the degree of disability of these physical and mental disorders.

Under current law, the PEB determines the degree of disability of those disabilities that are found by the PEB to render the individual unfit for continued military service. The PEB uses the VA disability rating schedule to rate the degree of disability. If the PEB disability rating determinations is 20 percent or below, the veteran will receive a lump-sum military disability separation payment. On the other hand, if the PEB disability rating determination is 30 percent or above, the veteran will receive monthly military disability retirement payments for the rest of the veteran's life and the veteran and his or her spouse will be entitled for the rest of their lives to free military medical care. The PEBs have long been notorious for unfairly assigning disability ratings that are lower than the degree of disability ratings the VA would assign for the same condition with the end result that the individual is barred from military disability retirement payments and free military medical care.

The bill wisely removes the PEBs from the degree of disability determination process and relies exclusively on the VA for this determination. This removes redundant and often inconsistent degree of disability determinations.

But the devil is in the details. The bill unwisely leaves all the details completely within the unbridled discretion of the Secretary of Veterans Affairs and the Secretary of Defense without even an opportunity for public participation or judicial review. NVLSP strongly recommends that the bill be amended to mandate that:

- VA shall, using the VA disability rating schedule, rate the degree of disability of both those disabilities found by a PEB to be unfitting and those other disabilities from which the individual suffers that were not found by the PEB to be unfitting;
- Any determinations made by VA that the disability existed prior to service or the result of willful misconduct shall be governed by title 38, U.S.C. and CFR;
- The initial VA degree of disability determinations shall be subject to appeal with VA under the provisions of title 38, U.S.C. and CFR, so that the veteran has a right to submit additional evidence, to a hearing, and to representation by an advocate. Final VA determinations on the veteran's degree of disability as of the date of discharge from military service shall be binding on the military department for purposes of determining entitlement to military disability separation pay, military disability retirement payments and free military medical care and shall be binding on the VA for purposes of VA service-connected disability compensation;
- If the veteran appeals the initial VA degree of disability determination and the appeal results in a change, the VA will promptly notify the military department of the change and the military department will promptly correct the veteran's military records to be consistent with the change;
- Before implementing the joint disability examination and determination process called for in the bill, the Secretaries of Veterans Affairs and Defense shall conduct a public rulemaking proceeding according to the provisions of section 553 of title 5, U.S.C., so that the public has advance notice of the proposal, and an opportunity to comment, and so that the Secretaries are required to consider public comment before issuance of final rules; and
- The final rules promulgated pursuant to the public notice and comment rulemaking proceeding shall be subject to judicial review in a U.S. district court under the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq.

Also, NVLSP supports sections 102, 104, 105, 106, 110, 301, and 302 of this bill.

Thank you for allowing NVLSP to present comments concerning these very important issues.

Prepared Statement of Steve Smithson
Deputy Director, Veterans Affairs and Rehabilitation
Commission, American Legion

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present The American Legion's views on this draft bill being considered by the Subcommittee today. The American Legion commends the Subcommittee for holding a hearing to discuss this extensive draft bill.

Section 101. Presumption of service-connection for veterans who were deployed in support of contingency operation with post traumatic stress disorder

There are three requirements that must be established in order to establish entitlement to service connection for post traumatic stress disorder (PTSD): (1) A current diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between the current symptomatology and the claimed in-service stressor.

According to 38 CFR § 3.304(f)(1):

> If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Unless the veteran was wounded or received a specific combat decoration or badge (such as the Combat Infantryman Badge or Combat Action Ribbon) or award for valor, it is often very difficult to establish that a veteran engaged in combat with the enemy in order to verify the claimed combat-related stressor. This is especially true of service in the combat theaters of Iraq and Afghanistan. Due to the fluidity of the battlefield and the nature of the enemy's tactics, there is no defined frontline or rear (safe) area. Servicemembers in non-combat occupations and support roles are subjected to enemy attacks such as mortar fire, sniper fire, and improvised explosive devices (IEDs) just as their counterparts in combat arms-related occupational fields. Unfortunately, such incidents are rarely documented making them extremely difficult to verify. Servicemembers who received a combat-related badge or award for valor automatically trigger the combat-related presumptions of 38 U.S.C. § 1154(b) and 38 CFR § 3.304(f)(1), but a clerk riding in a humvee, who witnesses the carnage of an IED attack on his convoy, doesn't automatically trigger such a presumption and proving that the incident happened or that he or she was involved in the incident, in order to verify a stressor in relation to a PTSD claim, can be extremely time consuming and difficult. Moreover, such claims are often denied due to the veteran's inability to verify the alleged combat-related incident (stressor) to the satisfaction of the Department of Veterans Affairs (VA).

For the reasons and examples discussed above, The American Legion supports the establishment of a presumption of stressor, for the purpose of establishing entitlement to service connection for PTSD, for any veteran who served in Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) as long as the alleged stressor is related to enemy action and is consistent with the circumstances, conditions, or hardships of such service. Such a presumption would not automatically presume service connection for PTSD, but would presume the alleged stressor occurred as long as the stressor is related to enemy action or the result of enemy activities and is consistent with the circumstances and conditions of service in Iraq or Afghanistan. As verifying the alleged stressor is often the most time and labor intensive requirement to satisfy in a PTSD claim, such a presumption would not only benefit the veteran, it would also benefit VA by negating extensive development, and in some cases overdevelopment, of the stressor portion of a PTSD claim and, in doing so, reduce the length of time it takes to adjudicate such claims.

Section 102. Readjustment of Schedule for Rating Disabilities

The American Legion is generally supportive of this section and we are pleased with the portion specifically prohibiting the lowering of the rating of a particular disability under the readjusted schedule in comparison to how it was rated under the rating schedule in effect on the date of the enactment of the Act. The American Legion also supports the provision of this section establishing an advisory Committee to the Secretary of disability compensation. We do, however, note that the rating schedule is not the major cause of problems with the VA disability compensation process. Inadequate staffing, inadequate funding, ineffective quality assurance, premature adjudications, and inadequate training still plague the VA regional offices and must be satisfactorily resolved otherwise any positive benefit anticipated from the implementation of this provision will surely be minimized.

Section 103. Study on Work Credit System of Veterans Benefits Administration

The American Legion fully supports this provision. We have long been a vocal critic of the Veterans Benefits Administration's (VBA's) current end product work credit system and we have addressed our concerns in testimony before this Subcommittee on several occasions. We have also been advised that the portion of this

section pertaining to suspension of award of work credits will be changed to call for suspension of issuance of work credits, only if VA does not devise and implement a new system of measuring work production that differs from the current system. It currently states that VA will suspend its work credit system until a new system is implemented. The American Legion supports this anticipated change. We also recommend that the study addressed in this section be performed by an agency such as the Government Accountability Office (GAO), which is not invested in the current flawed VBA work credit system.

Section 104. Study on Work Management System

The American Legion supports the provisions of this section.

Section 105. Certification of Employees of Veterans Benefits Administration Responsible for Processing Claims

The American Legion supports this section. As discussed previously in The American Legion's testimony before this Subcommittee, VA has developed and implemented a job skill certification test for veteran service representatives (VSRs). Unfortunately, the current test for VSRs is not mandatory as a condition of employment in that position and is completely optional. Moreover, it is our understanding that VA did not conduct any tests in 2007.

The ultimate goal of certification or competency testing should be to ensure that an individual in any given position is competent, proficient, and otherwise qualified to perform the duties required of that position. This goal will not be achieved if testing is not mandatory, or is not provided for all levels or for all positions, and remedial training or other corrective action is not required for those who do not successfully pass the test. We, therefore, recommend adding language to this section specifically mandating an improvement plan for those who do not pass the examination, including eventual termination, if necessary.

Section 106. Annual Assessment of Quality Assurance Program

The American Legion supports the provisions of this section requiring VA to contract with a private entity to conduct annual assessments of its quality assurance program. Receiving input on VA's performance assessment programs from an independent entity would undoubtedly provide new insight on how to enhance the current processes. Additionally, The American Legion continues to share the results of regional office quality review visits (approximately 40 to date) with both VA and Congress. Our quality reviews identified many of the problems that this draft legislation attempts to cure and The American Legion commends the Subcommittee for its efforts to improve VA adjudications.

Section 107. Expedited Treatment of Fully Developed Claims and Requirement for Checklist to be provided to Individuals Submitting Incomplete Claims

The American Legion supports the intent of this section but recommends adding the following language:

Nothing in this section would excuse VA from its duty to assist or its duty to notify if the claim is appealed (*see* 38 U.S.C. §§ 5103 and 5103A).

Section 108. Study and Report on Employing Medical Professionals to assist Employees of Veterans Benefits Administration

The American Legion is not opposed to the intent of this section which calls for a study to determine the need of VBA hiring medical professionals, including those who are not physicians, to act as medical reference or consultants to assist VBA employees with the assessment of medical evidence. We are also pleased that this section specifically states that such medical professionals are not to "be employed to rate any disability or evaluate any claim." We do, however, recommend that additional language be included specifically prohibiting VA adjudicators from relying on regional office medical consultants' opinions to make decisions in claims for benefits. We oppose this because it would be far too easy for the cadre of medical professionals to dominate the adjudication process.

Section 109. Assignment of Temporary Disability Ratings to Qualifying Veterans

This proposed section closely tracks the current regulation 38 CFR 4.28. The American Legion recommends that this section make it clear that mental conditions qualify for prestabilization or temporary ratings.

Section 110. Review and Enhancement of use of Information Technology at Veterans Benefits Administration

The American Legion welcomes innovative ideas, such as electronic claims processing and other uses of technology, which will enable VA to improve the service it provides to this Nation's veterans, especially in the arena of benefits delivery. We must, however, caution that automation does not guarantee quality claim development and speed does not guarantee accuracy or quality of data entry. Moreover, although the use of such technology might improve the process, it is not a magic bullet that will fix all the problems that are currently plaguing VA's disability claims process.

Areas such as inadequate staffing levels, training, quality assurance, accountability, premature adjudication of claims and other problems resulting from VA's current work measurement system, as previously addressed by The American Legion in testimony before the Subcommittee, must be adequately dealt with before any real improvement resulting from use of artificial intelligence can be realized. Therefore, artificial intelligence-based programs that direct the development and the adjudication of claims should be published in the Federal Register so that the public, especially stakeholders such as The American Legion, can provide written comments.

The American Legion believes that the human element should never be removed from this equation and we are pleased that various experts that testified before the Subcommittee on the use of artificial intelligence in claims processing also agreed with this philosophy. Additionally, it must also be kept in mind that the bulk of the time and effort expended by VA in the disability claims process is not in the actual adjudication or decisionmaking part of the process, rather it is the part of the process that involves the development of the claim prior to adjudication. This process involves informing the claimant of the evidence that is needed to substantiate the claims as well as assisting the claimant in obtaining the needed evidence, such as military personnel and medical records, relevant medical evidence (both private and VA), scheduling compensation and pension examinations and other efforts necessary before the claim is ready to be adjudicated. Evidence development can be very time consuming and it is extremely important that any electronic claims system utilized by VA in the future adequately address this important part of the process, not just the actual adjudication of the claim, or any actual improvement in the current process will be minimal at best.

Section 111. Treatment of Claims upon Death of Claimant

The American Legion is pleased to support the intent of this section. Specifically, we fully support allowing a deceased veteran's survivor to continue the claim upon the veteran's death rather than VA terminating the claim and requiring the survivor to file a separate claim for accrued benefits, as is the current practice. Not only does the current practice cause duplication of effort and add to the existing claims backlog by requiring a "new" claim to be filed, it imposes an arbitrary 1-year deadline for the filing of such a claim. This deadline is often missed by grief stricken family members who were either unaware of the deadline or were not emotionally ready to go forward with the claims process within a year of their loved one's death. This legislation provides a common sense approach that allows VA to avoid "reinventing the wheel" by not having to start over from scratch with a new claim and, at the same time, provides the deceased veteran's survivors with a more user friendly and less complicated claims process.

Section 201. Creation of Single Joint Department of Veterans Affairs and Department of Defense Disability Examination Process

The American Legion supports the intent of this section. We are, however, concerned that the current military disability evaluation system, including the pilot program referenced in this section, does not have an independent appeals route for the servicemembers during the Department of Defense (DoD) phase. If the member does not agree with the medical determination, diagnosis or extent of the service-connected unfitting condition, there is no option for a second medical opinion unless the soldier obtains it at his own expense and the Physical Evaluation Board (PEB) grants it entry into the case.

The military Medical Evaluation Board (MEB) and the PEB determinations can be formally appealed only to the Physical Disability Agency to which the PEB belongs. Thereafter, once separated or retired, the servicemembers, now veterans, begin the appeals process at the VA regional office level thus taking extensive time before they may receive an independent appeal of their case. The American Legion does not consider this to be fully mindful of the rights of military patients and soldiers who deserve to have an objective an independent recourse route in which to

appeal the findings in such an important medical and benefit determination process. Therefore, The American Legion urges that language be included in this section recognizing this significant shortcoming and establish an appeals process for both the military medical separations and medical retirements.

Section 301. Annual Reports on Workload of United States Court of Appeals for Veterans Claims

The American Legion does not oppose the provisions of this section.

Section 302. Modification of Jurisdiction and Finality of Decisions of United States Court of Appeals for Veterans Claims

The American Legion does not oppose the provisions of this section.

Conclusion

Thank you again, Mr. Chairman, for allowing The American Legion to present comments on this important draft legislation. As always, The American Legion welcomes the opportunity to work closely with you and your colleagues on enactment of legislation in the best interest of America's veterans and their families.

Prepared Statement of Eric A. Hilleman
Deputy Director, National Legislative Service
Veterans of Foreign Wars of the United States

Mr. Chairman and Members of the Subcommittee:

On behalf of the 2.3 million men and women of the Veterans of Foreign Wars of the U.S. and our Auxiliaries, I thank you for the opportunity to present our views on the "Veterans Disability Benefits Claims Modernization Act Of 2008." The modernization and improvement of the Department of Veterans Affairs (VA) claims processing system is a project that has been long time in the making.

The mounting backlog of claims, which has grown over the past 10 years has not gone unnoticed by the VA, the Congress, the Veterans Service Organization (VSO) Community, or most importantly the veterans waiting months and often years for assistance. In response to the growing wait times, increasing complexity of claims, and increasing numbers of veterans from current and past wars seeking benefits, a number of commissions in recent years were formed to address these problems.

The legislation we discuss today represents the most recent substantive step on the long road to reforming and improving a system. The system has served millions of veterans well over the years, but is now falling farther and farther behind. We are encouraged by many of the ideas outlined in this bill and the spirit with which they are offered. We sincerely hope that the energy expended to craft this legislation continues to facilitate the necessary followthrough that will ensure implementation of the recommendations contained herein. The problems that plague the Veterans Benefits Administration were many years in the making and it will take a number of measured improvements and change to cure the system's ailments.

We recognize that this is not the final version of the "Veterans Disability Benefits Claims Modernization Act of 2008." That said, we offer our opinions and analysis of the most current version of the draft this Committee has provided. We thank you for your willingness to incorporate our views on this bipartisan measure to overhaul the disability claims process.

Section by Section

Section 101: "Presumption of Service-Connection for Veterans Who Were Deployed in Support of a Contingency Operation with Post Traumatic Stress Disorder."

Today, veterans who seek service connection for post traumatic stress disorder PTSD must have three things: a diagnosis of PTSD, a physician's opinion that the PTSD was caused by an event in service, and evidence establishing that the event actually occurred. VA regulations lessen the burden of establishing the third criteria, proving the existence of the event, by allowing the receipt of certain medals awarded for participation in combat to some veterans, along with medals presented for valor, to suffice as evidence of an event (stressor) in service. Unfortunately, not everyone who engages in combat with an enemy receives a qualifying medal.

Section 101 seeks to establish a presumptive service connection for PTSD for veterans that "engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, and who is diagnosed with post traumatic stress disorder." While well intended, it is our view that this misses the mark. The VA has no problem granting service connection for PTSD even many years after service. What it does have a

problem with is granting PTSD when a veteran who was in combat cannot prove it by showing receipt of a medal. It is not uncommon for veterans who served in Vietnam during Tet, during the Battle of the Bulge in WWII, or following a year or more in Iraq, to be forced to wait months, sometimes years, while VA and DoD search unit records for any evidence of combat.

This legislation seeks to redefine how we view and evaluate PTSD as a Nation. As Members of our Nation's largest veterans' service organization made up of combat veterans, we support the intent of this section and its definition for the creation of a presumption to lessen the burden on disabled veterans who are diagnosed with PTSD. We suggest a substitution in language from "who engaged in combat with the enemy" to the language of those "who operated in a combat theater or area hostile to U.S. forces." This allows veterans exposed to the stressors of living and working, day in and day out, in a combat zone, driving truck convoys, for instance, across Iraq to require these stressors to be recognized. We would also suggest substituting "armed forces" for "a military, naval, or air organization." In this instance too broad of a definition may include a military organization such as defense contractors or Federal employees operating in a military organizational capacity. In some cases, they would clearly be a military organization of the U.S. and operating on government orders. For clarity sake, the designation of "U.S. Armed Forces" is identifiable and clearly defined in law.

Section 102: "Readjustment of Schedule for Rating Disabilities."

Section 102 would authorize a study of the disability ratings schedule. The study would be tasked with evaluating an "average loss of a veteran's earnings . . . [and] the veteran's quality of life" measure as determined by specific disabilities. Information to be used by this study would include, but not be limited to reviewing the Social Security Administration disability ratings, workers compensation systems, and foreign government disabilities compensation systems. The study would solicit feedback from private industry as well as VSOs. At the conclusion of the study, the report must be submitted to Congress weighing also this past year's multiple commission reports in concert with the views of the Secretary of Veterans Affairs.

The VFW supports a measured review of the ratings schedule, as stated by my colleague, Gerald T. Manar, Deputy Director of the National Veterans Service, before this Committee on February 26, 2008. We firmly believe that a one-time adjustment of the current schedule will not be sufficient to keep pace with the changing nature of "quality of life" and the evolving science of medicine, technology, and warfare.

We are encouraged by the provision of this bill to establish an Advisory Committee to review and manage the process of adjusting the ratings schedule. We urge you to ensure this Committee is independent, beyond reproach, and represents the interests of veterans. We ask that prominent experts in the VSO community be appointed to represent the veterans' voices on the 18 Member Advisory Committee.

Section 103: "Study on Work Credit System of Veterans Benefits Administration."

Section 103 would require a study of the mechanism that VA uses to award credit for claims worked by claims adjudicators. During the period of this study the work credit and award system would be suspended pending a report on it to Congress. This section further delineates a timetable for implementation and reporting. We support and encourage a review of this work and management process; however we are concerned with section (c).

In section (c), this legislation calls for a suspension of award of work credits during the evaluation period. We believe a wholesale suspension of all work credit would be counterproductive. VA is heavily dependent on its work credit system for tracking and managing its caseload. We urge this committee to consider banning performance awards based on production during the evaluation, leaving the mechanism for counting and tracking cases intact.

Section 104: "Study on Work Management System."

Section 104 would commission a study of the work management system. This section outlines point specific study contents relating to quality, efficiency, and increased productivity with an eye toward implementation of a rules-based software program to aid in claims processing.

The VFW supports technological advances within the VA with the goals of improving work processes. We believe that information technologies (IT) can be used to aid and improve the claims process. In studying the work management system, all aspects of the work process should be structured to incorporate IT applications where applicable. With a comprehensive review of VA's process our veterans can be better served by a more modern and efficient VA.

Section 105: "Certification of Employees of Veterans Benefits Administration Responsible for Processing Claims."

Section 105 would have VBA employees and managers responsible for claims processing take certification examinations. The Secretary would develop the exam, in consultation with interested stakeholders, VA employees and managers. The exam would be administered within 1 year of the enactment of this provision.

The VFW strongly supports certification of VA employees and managers. We view testing as a technical evaluation of the employees' knowledge specific to their field. Clearly, team leaders, and Veteran Service Center Managers should be able to demonstrate an expert's knowledge of the laws and regulations they are tasked with enforcing. While we believe that higher-level managers at both the local and national levels should have substantial knowledge of the claims adjudication process, we cannot support expanding certification to the highest levels of the VBA. We feel the VA Secretary should have the latitude to determine the levels examinations should be administered.

We welcome the inclusionary language granting VSO's, public, and private entities input into employee certification testing. Veterans groups represent the core constituents served by this testing regimen. The end goal remains accurate and timely claims processing; technical evaluations will aid to inform and improve the process.

Section 106: "Annual Assessment of Quality Assurance Program."

Section 106 would give the VA Secretary the authority to contract with an independent 3rd party to study and annually review VA's quality assurance program. The purpose of this study, beyond improving quality assurance, is to strengthen the employee certification program as prescribed by section 105 of this act. The Secretary would be tasked with the goals of measuring performance, accuracy, identifying trends in the regional offices with an eye toward automating data transfer and improving work processes.

The VFW supports the comprehensive annual assessment of the quality assurance program. We are pleased to see independent review of VA processes. Given the VA admitted error rate of claims approximated between 12 to 14 percent we feel an unbiased review would help VA to identify problems with the goal of producing accurate claims. We feel an independent body would be free from the countervailing political forces that produce pressures to misreport the error rate.

Section 107: "Expedited Treatment of Fully Developed Claims and Requirement for Checklist To Be Provided to Individuals Submitting Incomplete Claims."

Section 107 would establish a mechanism to expedite fully developed claims. It defines a fully developed claim as one that has received assistance and is submitted to VA from a VSO/county service officer or a claim that states the claimant does not wish to submit additional evidence. A checklist is prescribed by this section to ensure a detailed description of what may be needed by the VA for processing the claim as a fully developed claim.

We support this provision and believe that this practice should be encouraged since it reduces the workload on VA staff and ensures that the backlog is not unnecessarily increased. To guarantee that this practice actually works, VA should require that regional office personnel, managers and veteran service officers are adequately trained to recognize a properly developed claim and understand that receipt of such a claim triggers actions which trigger prompt adjudication.

We believe that VA should give no preferential treatment to any case which, upon review, is found not to be ready to rate. This is necessary to ensure that partially developed cases receive no preferential treatment, thereby slowing completion of claims already in process.

However, one of the purposes of this program is to educate veteran service officers as to the evidence needed to produce a ready to rate case. We suggest that VA could do this by offering service officers an opportunity to complete development in a case found not ready to rate by telling them exactly what evidence is missing and giving them 10 working days to produce it. The case could be considered ready to rate if the service officer is able to provide the necessary evidence. Failure to timely complete the claim would simply mean that the case would receive no preference and be worked under current procedures.

Section 108: "Study and Report on Employing Medical Professionals To Assist Employees of Veterans Benefits Administration."

Section 108 would study the applicability and effectiveness of staffing VBA with medical professionals to better inform the claims rating process. This provision would not employ medical professionals to rate any disability or evaluate a claim,

but it would study how medical professionals could assist claims raters from an education standpoint.

The VFW supports the concept of a better-informed claims ratings process and we support studying the benefits of employing medical professionals to inform the process. The goal should be the continuing education of those who evaluate evidence and rate cases. However, we are concerned that medical professionals may inadvertently influence the process with an opinion on a claimed condition over the course of advising of a claims adjudicator. We ask that this Committee clearly express its wishes to further educate and inform the process while avoiding physicians issuing professional opinions on a claimants' diagnosis.

Section 109: "Assignment of Temporary Disability Ratings to Qualifying Veterans."

Section 109 would further grant the VA Secretary the authority to award a stabilization rating and distribute moneys to severely disabled veterans on case-by-case bases. The Secretary would be allowed to grant 100 or 50 percent temporary ratings for veterans until their full claims folder could be adjudicated. The determining factors for granting temporary disability ratings are for recently discharged disabled veterans with a disability that prevents them from working or an injury with material impairment.

The VFW recognizes that this section is intended to offer interim relief to those veterans who may have to wait an extraordinarily long period for a final decision on their claims. Currently, VA has the authority that this provision of this bill seeks to codify in 38 CFR 4.28, "Prestabilization Rating from Date of Discharge from Service." This section of the Code already calls for a 50 or 100 percent stabilization rating within 12 months of a veterans discharge from service based on unemployability due to disability.

We support the concept of pre-stabilization ratings. We ask this Committee to encourage the VA to train claims adjudicators on this provision and encourage its use to the betterment of many seriously injured veterans.

Section 110: "Review and Enhancement of Use of Information Technology at Veterans Benefits Administration."

Section 110 calls for VA to review its processes and to develop a comprehensive plan to incorporate information technology (IT) into the claims adjudication process. VA is asked to examine how it might transfer all prescribed benefits processing tasks and information into computer software programs that eliminate the need for paper claims folders and to provide remote access to a veteran's claim by the veteran. The final report produced by VA would evaluate its current IT and its best practices as well as lessons learned. The whole of the review of IT should be done with the focus of a three-year implementation timetable for a comprehensive phase-in of new IT processes.

In our view there is computer programming and "artificial intelligence." Nearly everything touted as "artificial intelligence" is really just computer programmers giving answers to a very large number of yes/no questions. There is, however, ample opportunity to use computers to decide certain evaluations based on established findings. Evaluations for service connected visual impairment or hearing loss, largely based on loss of visual acuity, fields of vision or decibel loss, could be easily assigned by computers. We encourage VA to utilize properly programmed computers to apply regulations to discrete data to arrive at concrete evaluations. This will allow rating specialists more time to work on decisions requiring judgment and experience.

Section 111: "Treatment of Claims Upon Death of Claimant."

Section 111 allows a veteran's next of kin to be treated as the claimant for the purposes of accrued benefits. This bill allows the next of kin to designate an individual, other than the next of kin, to act in the capacity of the claimant receive the said benefits. New evidence pertaining to the claimant's case must be submitted within 1 year of the veteran's death.

We strongly support this provision. Many veterans have waited years to realize their claim for compensation with the VA. There is a popular mantra among many of these aging veterans, "the VA is trying to outlive me." This provision demonstrates that the government cares about the welfare of its veterans and their families.

Section 201: "Creation of Single Joint Department of Veterans Affairs and Department of Defense Disability Examinations Process."

Section 201 would simplify examinations for medically retired members of the military between the Department of Defense (DoD) healthcare network and VA. This section calls for one exam conducted by DoD for fitness of duty and one exam

conducted by VA to determine the severity of disability for the purpose of compensation. In creating one process with input for a cross agency development of a simplified evaluation process, it outlines cost sharing guidelines and agency areas of responsibility.

The VFW enthusiastically supports a simplified process between DoD and VA.

Section 301: "Annual Reports on Workload of United States Court of Appeals for Veterans Claims."

Section 301 would establish a reporting standard upon the chief judge of the Court of Appeals. The reports would consist of the number of appeals, petitions, applications, dispositions, settlements, oral arguments, and decisions.

The VFW has no position on this provision.

Section 302: "Modification of Jurisdiction and Finality of Decisions of United States Court of Appeals for Veterans Claims."

The VFW has no position on this provision.

Section 401: "Report on Implementation of Veterans' Disability Benefits Claims Modernization Act of 2008."

Section 401 states the VA Secretary would submit a report in under 180 days outlining the Secretary's plan for implementation of the Disability Benefits Claims Modernization Act of 2008.

The VFW supports reporting designed to improve the access to benefits for veterans.

We thank this Committee for this opportunity to submit our views and work closely with staff to improve veterans' benefits claims processing. We welcome any questions this Committee may have.

Prepared Statement of Carl Blake
National Legislative Director, Paralyzed Veterans of America

Mr. Chairman and Members of the Subcommittee, on behalf of Paralyzed Veterans of America (PVA) I would like to thank you for the opportunity to testify today on the "Veterans Disability Benefits Claims Modernization Act of 2008." PVA appreciates the emphasis this Subcommittee has placed on making real reforms to a disability claims system that is being crushed by the weight of the claims backlog. We hope that addressing the issues outlined in this legislation will better benefit today's veterans and the veterans of tomorrow.

PVA generally supports the provisions outlined in Title I of the proposed legislation. However, we do have some concerns with different aspects of the various provisions. With respect to the provisions of **section 101**, PVA generally supports the intent of the proposal to establish a presumption for service-connection for veterans who were deployed to a combat theater and who present symptoms of Post Traumatic Stress Disorder (PTSD). However, we believe there are serious flaws in the legislation as drafted.

First, the legislation establishes a standard that we believe is very difficult to prove in order to qualify for presumption. Specifically, the legislation states that the veteran must have engaged in combat with the enemy. This places the burden on the veteran to identify a specific event and submit evidence demonstrating that he or she was under fire from the enemy. We do not believe that this is the actual intent of the legislation, as it would make it even harder to receive a presumptive rating for PTSD.

Second, this section allows for a very significant increase in the claims backlog. As written, the legislation would allow a veteran who meets the defined criteria to file a claim for presumptive service-connection, including veterans of all war periods. If this is in fact the intent of this Subcommittee, that needs to be clarified. Furthermore, while we recognize the implication that the men and women currently serving in combat theaters in Iraq and Afghanistan are under constant, intense pressure, and that the situation alone can allow for PTSD to manifest itself, we are concerned that this may create a possibility for veterans to be compensated for PTSD that is not the result of service in a combat operation or theater.

PVA generally supports the requirement that the Department of Veterans Affairs (VA) readjust the schedule for rating disabilities called for in **section 102**. This is a concept addressed by both the Dole-Shalala Commission and the Veterans' Disability Benefits Commission (VDBC). It is important to note that the VA is currently undergoing a complete rewrite of its regulations governing application of the ratings

schedule. However, we certainly understand the desire of Congress to see to it that the VA updates the disability ratings schedule.

The only concern is the continued emphasis on adding a component to disability compensation that takes into account quality of life issues. While severe disabilities have an obvious impact on the ability to seek gainful employment, the affect on quality of life of individuals is far greater. Moreover, we are not convinced that there is a method to equitably and reasonably compensate disabled veterans for lost quality of life. We do believe that current compensation rates for VA disability compensation take into account the impact of a lifetime of living with a disability and the every day challenges associated with that disability.

PVA supports **section 103** that calls for a study of the work credit system used by the Veterans Benefits Administration (VBA). This is the system that the VBA uses to evaluate the production of its claims adjudication staff. PVA particularly appreciates the emphasis placed on performance standards and accountability measures in the development of a new work credit system. We would, however, caution the Subcommittee on the language concerning implementation of a new work evaluation system. The language suggests that the current work credit system should be eliminated. While we certainly agree that there are flaws in that system, given the focus on quantity rather than quality, it is premature to assume that the framework of the current system might not be the best measuring stick with appropriate changes.

PVA likewise supports the requirement to study the work management system outlined in **section 104**. We appreciate the emphasis placed on maximizing the use of information technology (IT) applications, particularly in light of the frustrations expressed over the last year with the VBA's IT systems.

PVA has no problems with **section 105** of the legislation that requires VBA employees and managers to take a certification examination. PVA requires this from its service officers who provide direct support to veterans seeking benefits. This has proven to be an effective tool in evaluating the knowledge of our employees and ensuring that the best qualified individuals are assisting veterans. It only makes sense that the VA be taking similar steps. Likewise, we support **section 106** of the legislation that will support the development of the certification examination.

We have no objection to **section 107** of the proposed legislation that is meant to expedite consideration of a fully developed claim. We appreciate the recognition given to the work of service officers of the veterans' service organizations under the newly created section 5109C of Title 38. However, we do have some concern about the requirement for a checklist to be provided to individuals submitting claims. It seems that in order for the VA to provide a checklist of missing items in an incomplete claim, it will have to already adjudicate the claim. We certainly do not believe that this is the intent of the Subcommittee, and we believe that this provision warrants further consideration and clarification.

PVA has no objection to **section 108** of the legislation that requires a study and report on employing medical professionals to assist employees of the VBA. However, we believe that the language needs to be clear as to what the desired role of medical professionals is meant to be in the process. We have no problem with medical professionals serving as a resource to claims adjudication staff on questions directly related to general health issues. However, we do not believe medical professionals should be called on to make judgments on issues as they relate to adjudication of veterans claims specifically.

PVA has no objection to the provisions of **section 109** that would require the VA to provide a temporary disability rating to certain veterans with a disability or who might not be employable. However, it is important to ensure that provision of a temporary disability rating will not preclude the VA from completing a veteran's claim in a timely manner. We particularly appreciate the language that will allow the temporary rating to be extended, if necessary.

Recent hearings have demonstrated how far behind the VBA is in using information technology in its claims adjudication process. While we believe that the entire claims process cannot be automated, there are many aspects and steps that certainly can. We have long complained to the VA that it makes no sense for severely disabled veterans to separately apply for the many ancillary benefits to which they are entitled. Their service-connected rating immediately establishes eligibility for such benefits as the Specially Adapted Housing grant, adaptive automobile equipment, and education benefits. However, they still must file separate application forms to receive these benefits. That makes no sense whatsoever.

Furthermore, certain specific disabilities require an automatic rating under the disability ratings schedule. It does not take a great deal of time and effort to adjudicate a below knee single-leg amputation. An advanced information technology sys-

tem can determine a benefit award for just such an injury quickly. With these thoughts in mind, PVA fully supports the provisions of **section 110**.

PVA supports the provisions of **section 111** of the legislation. We have supported similar legislation in the past. It is only appropriate that the original claimant's beneficiary be permitted to complete the claims process if the veteran dies during the process.

With respect to the transition of servicemembers from active duty to veteran status outlined in **Title II** of the legislation, we certainly support the intent. We supported the recommendations of both the Veterans' Disability Benefits Commission and the Dole-Shalala Commission that called for a single separation physical. As mentioned in the legislation, the VA and DoD are currently conducting a pilot program that addresses this issue and we look forward to their findings during the conduct of this program.

We do believe that the language should stipulate that the VA be responsible for actually performing the separation physical. The VA has greater experience at providing a comprehensive medical examination as it requires the most thorough medical review of a veteran to determine degree of disability. DoD separation physicals tend to be singularly focused on the immediate health issue that impacts fitness for duty.

We are pleased with the fact that the legislation calls for the DoD to only determine fitness for duty as a part of the process and the VA to determine the degree of disability. This reaffirms the responsibility that each department has in a single separation process. The DoD simply needs to be concerned about whether or not a service Member can perform his or her military responsibilities. The VA is the subject matter expert on determining degree of disability for compensation purposes.

PVA supports the requirement in **section 301** of the legislation for the United States Court of Appeals for Veterans Claims to file an annual report detailing the workload it handles each year. The list of required information seems to be comprehensive. This section is in accordance with the recommendations of *The Independent Budget*. We would only hope that the information provided is put to good use.

With respect to **section 302**, we have had extensive discussion at PVA between our Veterans Benefits staff and our General Counsel. This section would amend the jurisdiction of the United States Court of Appeals for Veterans Claims to require it to essentially address all issues raised by an appellant, and it would preclude the VA from confessing error. While we recognize that this issue is addressed in *The Independent Budget* for FY 2009, our General Counsel has expressed some concerns with this provision of the legislation that I would like to outline.

While we understand that it is sometimes frustrating when the Court fails to address issues raised to it, there is no Court that is required by its jurisdictional statute to address all issues raised by an appellant. We believe that requiring the Court to address all issues raised in an appeal will certainly result in a significant increase in processing time for cases on appeal to the Court. We believe that this could create a situation where the Court may find cases and even issues to be frivolous whenever it can as a means to discourage appellants from bringing cases and issues that are not relevant to a decision on the matter.

We also believe that it can be harmful to veterans to preclude the VA from confessing error in cases on appeal to the Court. Confessing error is something that we should encourage the government to do when appropriate. Over the years, PVA has achieved a great deal of success by working with the VA and encouraging them through negotiation to confess error resulting in our clients obtaining benefits in the most expeditious manner.

Mr. Chairman and Members of the Subcommittee, PVA would once again like to thank you for the opportunity to provide our views on this important legislation. We look forward to working with you to continue to improve the benefits and services available to veterans.

Thank you again. I would be happy to answer any questions that you might have.

Prepared Statement of Bradley G. Mayes
Director, Compensation and Pension Service, Veterans Benefits Administration, U.S. Department of Veterans Affairs

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the draft "Veterans Disability Benefits Claims Modernization Act of 2008." I am accompanied today by Richard J. Hipolit, Assistant General Counsel, and Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals.

I will address today only those provisions of the draft bill for which the administration could develop and coordinate its views in the time provided.

Section 101

Section 101(a) of the draft bill would add post traumatic stress disorder (PTSD) to the statutory list of diseases that are presumed to have been incurred in or aggravated by service under certain circumstances. The presumption would apply to any veteran who engaged in combat with the enemy in active service during a period of war, campaign, or expedition and who is diagnosed with PTSD. Section 101(b) would make the presumption applicable to compensation claims pending on or after the date of enactment.

The Department of Veterans Affairs (VA) does not support section 101. Currently, in cases involving an in-service diagnosis of PTSD by a mental health professional, VA will accept any reasonable in-service stressor as long as it appears consistent with the circumstances of the veteran's service and, if a VA examination and other evidence support the decision, establish service connection on a direct basis. However, PTSD may first be diagnosed many years after service. Under such circumstances, VA regulations require a link between the symptoms of properly diagnosed PTSD and an in-service stressor. If a veteran establishes that he or she engaged in combat and the claimed stressor is related to combat, VA concedes (in the absence of clear and convincing evidence to the contrary) the existence of a stressor sufficient to establish service connection. Nonetheless, in the case of a post-service diagnosis of PTSD, we believe it is necessary that medical evidence establish a link between the PTSD and the in-service stressor. Because section 101 would eliminate this requirement, we cannot support it.

Section 102

Section 102 would require VA to conduct a study within 180 days of the date of enactment on adjustment of the Schedule for Rating Disabilities so as to base the schedule on current standards, practices, and codes in common use by the medical and disability profession and determine, among other things, how the schedule could be adjusted to take into account the loss of quality of life resulting from specific disabilities. VA would be required to report to Congress on its conclusions and recommendations based on the results of the study within 60 days of its completion and submit to Congress not later than 120 days thereafter a plan to readjust the rating schedule within 5 years to align the schedule with medical best practices, prioritize readjustment with respect to PTSD, traumatic brain injury, and certain other disorders, ensure the schedule is automated in accordance with a comprehensive plan called for in section 110 of the draft bill, and ensure provision of a transition plan to ease transition to the readjusted schedule. VA would be directed to revise the schedule in accordance with this plan and to form an Advisory Committee on Disability Compensation with which to consult regarding the maintenance and periodic readjustment of the rating schedule.

VA does not support section 102. On October 16, 2007, the Administration submitted to Congress proposed legislation, "America's Wounded Warriors Act." Section 201(b) of that bill contains a proposal for a study regarding creation of a schedule for rating disabilities based on current concepts of medicine and disability, taking into account loss of quality of life and loss of earnings resulting from specific injuries or combination of injuries. We believe that bill provides the most promising prospect for meaningful revision of the rating schedule and urge its enactment instead of section 102 of the draft bill under consideration today. Among our concerns with the draft bill is the requirement of section 102(c)(1)(A) that the plan for readjustment of the rating schedule that VA would be required to submit to Congress contain provision for alignment of the schedule with concepts drawn from the Current Procedural Terminology Manual, the International Classification of Diseases, the Diagnostic and Statistical Manual of Mental Disorders, and the applicable American Medical Association Guides. These sources represent highly complex coding systems intended for purposes other than rating of disabilities for compensation purposes. We believe reliance on these sources would introduce unwarranted complexity to our disability evaluation process and could undermine our efforts to enhance consistency in rating disabilities. In addition, VA has contracted for studies on Quality-of-Life and Loss-of-Earnings compensation and on transition payments. The results of these studies are due in August and could form the basis for a reform such as this legislation would require.

Section 103

Section 103(a) would require VA to study the Veterans Benefits Administration's (VBA's) work credit system, which is used to measure VBA employees' work production. Section 103(b) would require VA, in carrying out the study, to consider the ad-

visability of implementing: (1) performance standards and accountability measures to ensure that benefit claims are processed objectively, accurately, consistently, and efficiently and that final decisions on claims are consistent and issued within a certain time; (2) guidelines and procedures for the prompt processing of claims that are ready to rate when submitted; (3) guidelines and procedures for processing claims submitted by severely injured and very severely injured veterans; and (4) requirements for assessing claim processing at each regional office for the purpose of producing lessons learned and best practices.

Section 103(c) would require VA to establish a new system for evaluating the work production of VBA employees. The system would have to be based on findings of the study required by subsection (a), would have to focus on evaluating the accuracy and quality of ratings decisions made by VBA employees, and could not resemble or be based on any concept on which the current system is based. Section 103(c) would also prohibit VA from awarding a work credit to any VBA employee until VA has implemented the new system. Section 103(d) would require VA to submit to Congress, not later than 180 days after the date of enactment, a report on the study and VA's progress in implementing the new employee evaluation system.

VA does not support section 103. VBA periodically conducts work measurement studies, and employee performance standards are derived from those studies. Suspension of work credit until implementation of a new system would delay provision of feedback to employees and may have the effect of concealing organizational weaknesses. The potential impact of this provision on VA's ability to effectively manage organizational performance and determine resource needs is of great concern to us. Furthermore, while VA is not opposed to studying new work-rate measurement methodologies, we are concerned that the provision of section 103(c) prohibiting the contemplated new system for evaluating work production from resembling or being based on any concept on which the current system is based would seem to prejudge the results of the study that section 103 would authorize.

Section 104

Section 104(a) would require VA to study and report to Congress on the VBA work management system, which is designed to reduce claim processing time. Section 104(b) would require VA to contract for an evaluation of VA's training and performance assessment programs for VBA employees who are responsible for matters relating to compensation and pension benefits and to report to Congress on the results of that evaluation.

VA does not support this provision because it is unnecessary. We are currently implementing a comprehensive strategy to integrate various information technology initiatives to improve claims processing. At the core of our strategy is the implementation of a business model for compensation and pension claim processing that is less reliant on paper documents. Initial pilot efforts have demonstrated the feasibility of using imaging technology and computable data to support claims processing in the compensation and pension programs. In addition to use of imaging and computable data, we are incorporating enhanced electronic workflow capabilities, enterprise content and correspondence management services, and integration with our modernized payment system, VETSNET. Further, we are exploring the utility of business rules engine software for both workflow management and to potentially support improved decisionmaking by claims processing personnel. We recently contracted with IBM to analyze our current business processes and provide recommendations to further improve our operational efficiency and consistency. The recommendations and plans provided by IBM are consistent with VBA's goal to completely transition compensation claims processing to a paperless, electronic environment. We are focused on developing an integrated plan, including milestones and performance metrics, so that we and our stakeholders will be able to assess our progress in this endeavor. We would prefer to maintain our focus on the measures we are already taking, rather than divert resources to a new evaluation effort.

Section 105

Section 105(a) would require VA to require appropriate VBA employees and managers who are responsible for processing benefit claims to take a certification examination. The examination would have to be developed in consultation with examination development experts, interested stakeholders, including the VBA employees and managers, and appropriate public and private entities, including veterans service organizations and other service organizations. Section 105(b) would require VA to implement administration of, and procedures relating to, the certification of employees not later than 90 days after the date of enactment and develop the certification examination not later than 1 year after that date.

VA does not support this provision because it is unnecessary. VBA already has a thorough certification examination process for Veterans Service Representatives and that process is being expanded. Pilot testing has been conducted for Rating Veterans Service Representatives, and a field test is scheduled for next month. In addition to being unnecessary, Section 105 would also impose unrealistic deadlines considering that aspects of this activity would be subject to collective bargaining requirements.

Section 106

Section 106 would amend 38 U.S.C. § 7731 to require VA to enter into a contract with an independent third-party entity to conduct annual assessment of the quality assurance program required under that section. VA would be required to use the information gathered through the annual assessments in developing the employee certification required under section 105 of the draft bill.

VA does not support this provision because it is unnecessary. VBA currently has a robust quality assurance program under which over 15,000 individual claim folders containing decisions will be reviewed annually by 2009. Site visits are scheduled so that each regional office is visited a minimum of once every 3 years. Additionally, VA conducts specialized reviews where appropriate. VA has conducted initial piloting and validation of tools to monitor consistency of decisionmaking across regional offices. We have determined that the methodology we have developed is effective, and we will soon begin regular assessments of the most frequently rated diagnostic codes to evaluate consistency of service-connection and rating determinations across regional offices. We have also implemented a quality assurance program using silent monitoring to assess the quality of assistance provided on our toll free call-in number. The Government Accountability Office, in a recent assessment of the Department of Defense (DoD) Disability Evaluation System, referenced the VA compensation and pension quality review program as a favorable model for adoption.

Section 107

Section 107(a) would add a new section 5109C to title 38, United States Code, requiring VA to take such actions as necessary to provide for the expeditious treatment of fully developed claims to ensure that any such claim is adjudicated not later than 90 days after submission. A fully developed claim would be one for which: (1) the claimant received assistance from a veterans service officer or with which the claimant submits an appropriate indication that the claimant does not intend to submit any additional information in support of the claim and does not require additional assistance with respect to the claim; and (2) submits a written certification stating that no additional information is available or needs to be submitted in order for the claim to be adjudicated. Section 107(b) would amend 38 U.S.C. § 5103 to require VA, as part of its notice to claimants of the information and evidence necessary to substantiate a claim, to provide the claimant with a checklist including a detailed description of any information and evidence required to be submitted by the claimant to substantiate the claim. These measures would be required to be implemented within 180 days of enactment.

VA does not support section 107(a) because claims that are received ready-to-rate are already fast tracked. Further, claims submitted by unrepresented veterans or veterans represented by veterans service organizations may in some instances be incomplete, and VA must work with the veterans and their veterans service officers, if any, to assist them in fully developing their claims. Thus, section 5109C could have the unintended consequence of requiring VA to prematurely adjudicate claims that warrant additional development, including claims that are meritorious and would result in an award of benefits upon full development.

We also do not support section 107(b). While we desire to improve the utility of our notice letters, to the extent that the intention of the bill is to require a checklist containing claim specific information, we believe the provision may actually result in delayed claim adjudications and unnecessary litigation. For instance, section 5109C, as drafted, requires VA to furnish a checklist, including "a detailed description of any information or evidence required to be submitted by the claimant to substantiate the claim." This language appears to impose upon VA a duty to "preadjudicate" a claim for benefits, that is, to conduct a review of the information or evidence submitted to date and provide a detailed assessment to the claimant as to what portion of the evidence, if any, needed to substantiate the claim is missing. This "preadjudication" of a claim, if required, would unduly burden our personnel and would hamper our ability to serve veterans.

Moreover, because the checklist would be provided as part of VA's required Veterans Claims Assistance Act notice, we believe that it would run a high risk of being considered by a court to be incomplete because relevant issues may not be recog-

nized early in the adjudication process. Our experience with the current notice requirements clearly indicates that any notice requirement will be subject to judicial interpretation that may necessitate large scale reworking of claims. For the foregoing reasons, a claim-specific notice such as that apparently contemplated by section 107(b) would place too great a burden on VA claim adjudication personnel and severely hamper our efforts to reduce our claim backlog.

Section 108

Section 108 would require VA to conduct a study of the need of VBA to employ medical professionals, including medical professionals who are not physicians, to act as a medical reference for employees required to assess medical evidence submitted in support of claims. VA would be required to report to Congress within 180 days of enactment on the results of the study.

VA does not support this legislation because VA has physicians available in its Veterans Health Administration who can offer medical opinions to VBA claim adjudicators.

Section 109

Section 109 would add a new section 1156 to title 38, United States Code, requiring VA to assign for compensation purposes a temporary disability rating of 100 percent or 50 percent for a veteran who has been discharged from active duty for 365 days or less, for whom a permanent disability rating cannot be immediately assigned, and who has a severe disability making substantially gainful employment not feasible or advisable or an unhealed or incompletely healed wound or injury where material impairment of employment is likely. The temporary rating would remain in effect until the earlier of the date on which the veteran receives a permanent disability rating under the rating schedule or the date that is 365 days after the date of the veteran's last separation from active duty. VA would be required to review all pending disability compensation claims within 30 days of the date of enactment to determine whether the veteran is entitled to a temporary disability rating under this provision.

VA does not support this provision because it is unnecessary. VA already has sufficient authority under its regulations to award prestabilization ratings for all disabilities using criteria comparable to those specified in the legislation. Further, the review of all pending claims within 30 days after the date of enactment is not feasible using currently available resources.

Section 110

Section 110 would require VA, within 1 year after the date of enactment, to conduct a review of the use of information technology by VBA and develop a comprehensive plan for the use of such technology in claims processing to reduce subjectivity, avoidable remands, and regional office variances in disability ratings. This section would also require VA to develop a plan that, within three years of implementation, would reduce claim processing time for each claim processed by VBA to not longer than the average time required to process a claim as identified in the most recent annual report submitted under 38 U.S.C. §7734. VA would further be required to submit a report to Congress on the required review and plan not later than January 1, 2009.

VA does not support section 110 because a comprehensive approach to accomplishment of the goal of this legislation is already underway. As I noted in my comments on section 104 of this bill, we are currently implementing a comprehensive strategy to integrate various information technology initiatives to improve claims processing.

Section 111

Section 111 would add a new section 5121A to title 38, United States Code, to provide that the person who, under current law, would receive accrued benefits based on the death of a veteran claimant who dies while awaiting the adjudication of the claim (the veteran's surviving spouse, child, or dependent parent) be treated as the claimant for purposes of processing the claim to completion. It would permit the person to submit new evidence in support of the claim during the 1-year period beginning on the date of the veteran's death. If that person certifies to VA that he or she does not want to be treated as the claimant, the person may designate the individual who would receive accrued benefits based upon the first person's death to be treated as the claimant for purposes of processing the claim to completion. This provision would apply to the claim of any veteran who dies on or after the date of enactment.

We do not object to this section, which would allow the submission of evidence in support of a claim that was pending before VA when the veteran died. Such legislation would be consistent with the Veterans Disability Benefits Commission's rec-

ommendation to allow a veteran's survivors, but not a creditor, to pursue the veteran's due but unpaid benefits and any additional benefits by continuing a claim that was pending when the veteran died, including presenting new evidence not in VA's possession at the time of death.

However, as currently drafted, section 111 would raise several issues with respect to its implementation. Section 5121(a) of title 38, United States Code, requires VA to pay accrued benefits (periodic monetary benefits to which a deceased claimant was entitled at death under existing decisions or evidence in the file at the time of death) to certain specified individuals (for a deceased veteran, the veteran's spouse, children, or dependent parents). Nothing is required of those individuals other than the filing of an application within 1 year of the claimant's death and proof that the individual qualifies as a payee under section 5121. However, only if an application is timely filed and the applicant establishes entitlement to accrued benefits would that person "receive any accrued benefits due to the veteran." Only then could the person be treated as the claimant under section 111. Furthermore, permitting a substitute claimant upon a veteran's death could require VA to develop the claim, including obtaining medical evidence on the deceased veteran who could no longer be examined or authorize the release of protected health information. The laws of the various states govern the disclosure of protected health information by private health care providers, so VA and the substitute claimant would be limited by such laws in obtaining medical evidence concerning the deceased veteran.

Under the bill's language, it would be possible that more than one person could simultaneously be "the claimant." Under section 5121, upon the death of a veteran and in the absence of a surviving spouse, the veteran's children or dependent parents may be entitled to accrued benefits. Therefore, under section 111 of the bill, in the absence of a surviving spouse, "the claimant" could be two or more children of a veteran or two dependent parents. This situation could create complications if the persons disagreed as to how to prosecute the claim.

Section 111 is unclear as to what would happen if the person who would receive a deceased veteran's accrued benefits does not want to be treated as the claimant. If, as section 111 would permit, that person designates as the claimant "the person who would receive such benefits upon the death of the person who would otherwise be treated as the claimant" under the provision, but also pursues a claim for accrued benefits, then both persons would be pursuing a claim for the same benefits. Furthermore, the two claims could be decided on different evidence because a claim for accrued benefits under section 5121 is limited to the decisions existing or evidence on file when the veteran died, but a claim pursued under section 111 would not be so limited.

At this time, we cannot estimate the cost of this section because we do not have sufficient data to determine the number of veterans who die with a claim pending. Additionally, we cannot determine whether their claims would be granted with a compensable evaluation.

Section 201

Section 201(a) would require VA and DoD to review the results of the Single Disability Evaluation/Transition Medical Examination pilot study conducted pursuant to law and jointly create a single disability examination process for medically transitioning members of the Armed Forces and members of the reserve components. Section 201(b) would require VA and DoD to: (1) ensure that DoD determines fitness for duty and VA rates the severity of disability for members who medically separate or retire from active duty service or reserve component service; (2) establish a cost-sharing arrangement for the examination process; (3) consider the reports and applicable recommendations on a single examination process made by the Independent Review Group on Rehabilitative Care and Administrative Processes at Walter Reed Army Medical Center and the National Naval Medical Center, the Secretary of Veterans Affairs Task Force on Returning Global War on Terror Heroes, the President's Commission on Care for America's Returning Wounded Warriors, and the Veterans' Disability Benefits Commission; and (4) ensure that DoD and VA share the costs associated with conducting examinations under the examination process.

Section 201(c) would require VA and DoD to implement the single disability examination process not later than 1 year after the date of enactment. Section 201(d) would require VA and DoD to submit to Congress an interim report not later than 3 months after the date of enactment and a final report not later than 6 months after that date.

VA does not support section 201 because it assumes that the pilot program currently underway will be successful and should be expanded to all service personnel subject to the disability evaluation process. VA, DoD, and Congress should wait for

the results of the pilot project before determining whether continuation and expansion of the joint program would be beneficial.

Section 301

Section 301 would require the Chief Judge of the United States Court of Appeals for Veterans Claims (Veterans Court) to report annually to the House and Senate Committees on Veterans' Affairs on the Court's workload during the previous fiscal year. Because this section would impose the reporting requirement on the Court and require nothing of VA, we defer to the Court on this matter.

Section 302

Section 302(a) would make the following changes with respect to the Veterans Court's review of decisions of the Board of Veterans' Appeals (Board). It would prohibit VA from making an assignment of error or conceding an error not raised by the appellant unless first obtaining the appellant's written consent. It would add to the Veterans Court's current powers (to affirm, modify, or reverse a Board decision or remand the matter, as appropriate) the power to "vacate and remand" a Board decision. It would prohibit the Court from affirming, modifying, reversing, remanding, or vacating and remanding a Board decision without first deciding all assignments of error raised by an appellant for each particular claim for benefits. Finally, it would permit the Court, if the Court reverses a decision on the merit of a particular claim and orders an award of benefits, not to decide any additional assignments of error with respect to that claim. Under section 302(b), these changes would apply to Board decisions made on or after the date of enactment.

VA opposes enactment of section 302. The provision prohibiting VA from making an assignment of error or conceding an error not raised by the appellant, without first obtaining the appellant's written consent, is undesirable and unnecessary. If an appellant has retained a representative, then the parties to the litigation jointly negotiate the terms of a remand, and there is no need to require the appellant's consent to any confessions of error. If, on the other hand, the appellant is not represented (as is often the case), then the Veterans Court typically orders the appellant to respond to VA's remand motion and thereby provides ample opportunity for the appellant to object to the remand and any confessions of error made by VA. Moreover, the appellant can waive an error noted by VA if the appellant believes that such error was harmless or otherwise not worthy of the Court's consideration. Thus, the existing system already safeguards the appellant's interests.

Anywhere from 19 percent to 47 percent of appellants represent themselves before the Veterans Court. Many have limited educations, are otherwise unsophisticated in litigation and adjudication matters, or suffer the effects of mental disorders. Many are suspicious of the government. These factors would hinder VA's ability to assign errors for the Court's consideration and, perhaps, act as a disincentive to do so. Given these realities, it is not viable to require written consent from an appellant before VA may submit the issues to the Court for resolution.

Moreover, this provision would create ethical problems. For example, VA counsel are ethically bound to represent VA's interests. Counsel cannot ethically cede VA's interests to his or her adversary by permitting VA's adversary to determine what issues VA may argue before the Court.

In addition, this provision would implicate counsel's duty of candor to the Court. The Veterans Court observed in *Johnson v. Brown*, 7 Vet. App. 95 (1994), "[a]s to the General Counsel's general responsibilities, Rule 3.3(a)(3) of the American Bar Association's Model Rules of Professional Conduct, the Code of Professional Responsibility, adopted in Rule 1(b) of the Appendix to Rule 46 of this Court's Rules of Practice and Procedure [Court's Rules] (see Misc. Order No. 3–92 (Aug. 1, 1992) (en banc)), states: 'A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel'. Model Rules of Professional Conduct Rule 3.3(a)(3) (1991). The Secretary's confession of errors here is thus a disclosure of legal authority, 'not disclosed by opposing counsel', that is worthy of the Court's attention, not its disregard." *Johnson*, 7 Vet. App. at 98. It is undesirable for section 302 to so constrain counsel's duty of candor to the Court.

Importantly, the Veterans Court is authorized by law to review the entire record and consider all errors. Although an appellant is entitled to seek judicial review by filing a notice of appeal, the law does not afford an appellant the right to frame the issues or to otherwise control the appeal once the Court is vested with jurisdiction. As noted in *Johnson*, "[t]he law has specifically assigned to this Court 'exclusive jurisdiction to review decisions of the Board.' 38 U.S.C. § 7252(a). In carrying out this review, the Court is directed to, inter alia, 'decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the

meaning or applicability of the terms of an action by the Secretary'. 38 U.S.C. § 7261(a)(1). Under this broad authority—indeed, mandate—to carry out comprehensive judicial review of [Board] decisions, the Court undoubtedly would have jurisdiction to consider those same Board errors if raised by the appellant or noted, sua sponte, by the Court itself. Hence, the fact that these errors were here raised by the Secretary cannot deprive the Court of jurisdiction to consider them." *Johnson*, 7 Vet. App. at 98–99.

The provision that would prohibit the Veterans Court from deciding an appeal without first addressing every allegation of error raised by the appellant is also problematic. The notion of requiring the Court to delay remanding a case until it decides all assignments of error raised by an appellant was cogently rejected by the Court in *Best v. Principi*, 15 Vet. App. 18 (2001) (per curiam order). Such a rule would harm rather than help veterans.

In *Best*, the Court had remanded the appeal for VA's consideration of a recently enacted public law, but the appellant objected on the basis that the Court had not considered allegations of error that he had raised which might be capable of repetition on remand. The Court offered a compelling analysis regarding why a remand on narrow grounds is in the best interest of appellants and the sound administration of justice. First, the Court explained that, when it issues a remand, the underlying Board decision is vacated (i.e., rendered a nullity), and the claim must be adjudicated anew. The Board must reexamine the case and permit the claimant to submit additional evidence and additional arguments. In other words, the claimant retains the right to raise to the Board all putative errors in the handling of the claim, without being limited by the specific grounds of the Court's remand order.

Second, the Court noted in *Best* that the practice of remanding a case on narrow grounds was consistent with the practice in other courts, and consistent with the statute defining the Court's scope of review. It warned, for example, that the Court might be relegated to the role of issuing a mere advisory opinion regarding the putative errors asserted by an appellant, because further development of factual and legal issues can change the landscape of the case on remand.

Finally, the Court in *Best* also warned that, if it were to rule on every allegation raised by an appellant, then any rulings against the appellant would foreclose him from reasserting the issues on remand. "A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him." *Best*, 15 Vet. App. at 20. Such foreclosure would deprive an appellant of the opportunity to craft a more persuasive argument below against the new legal and factual context of the readjudicated claim, and would deprive the appellant of judicial review of the issue if VA decides against him or her.

The *Best* holding is a flexible rule, and it does not require a judge to disregard other putative errors asserted by an appellant when remanding a case. Instead, the *Best* rule leaves to the discretion of the judge which arguments will be addressed, depending upon the circumstances of each case. Indeed, in several remanded appeals, the Veterans Court has chosen to address each putative error raised the appellant, notwithstanding *Best*.

This provision of the draft bill would be unfair to those who are waiting in the queue for the judges to get to their cases. The parties before the Veterans Court are entitled to a timely decision. Many appellants before the Veterans Court are in poor health or are elderly. The purely conjectural allure of the provision must yield to the very real possibility that some appellants will die before obtaining a decision from the Veterans Court, if the judges are required to address every argument in every case without regard to whether the argument would make a difference to the ultimate outcome of the appeal.

Moreover, this provision would deprive the judges of the flexibility that they need to manage a burgeoning caseload with limited resources. Notably, the provision makes no distinction between colorable arguments and frivolous arguments—the Veterans Court must address them all. This requirement is antithetical to the principle of judicial economy and is counterproductive to Congressional efforts to reduce the inventory of appeals at the Veterans Court. If section 302 were enacted, decisions on appeals would be delayed, the backlog would grow, and veterans and VA would be deprived of timely resolution of their disputes.

For all these reasons, VA believes that enactment of section 302 of the draft bill is undesirable, and we oppose it.

Section 401

Section 401 would require VA to submit within 180 days of the date of enactment a report to Congress describing how VA plans to implement the legislation and the amendments made by it.

A number of provisions of the draft bill include requirements for reports to Congress on studies and actions to implement particular provisions of the bill. The report contemplated by section 401 would seem to duplicate, and in some instances conflict with, the timing of reports otherwise called for in the bill. For this reason, VA does not support enactment of section 104.

This concludes my statement, Mr. Chairman. I would be pleased to entertain any questions you or the other Members of the Subcommittee may have.

Prepared Statement of Raymond C. Kelley
National Legislative Director, American Veterans (AMVETS)

Chairman Hall, Ranking Member Lamborn, and Members of the Subcommittee:

I am pleased to submit to this Committee on behalf of AMVETS our views on the "Veterans Disability Benefits Claims Modernization Act" (Act).

Section 101 of the Act will provide presumption of service-connection for veterans who were deployed in support of contingency operation with post traumatic stress disorder (PTSD). This would allow those who engage in combat with the enemy and diagnosed with PTSD to be granted presumption of a stressor for service-connection. AMVETS supports the spirit of this provision, however, due to the Department of Veterans Affairs' high standard of proof for consideration of engaging in combat with the enemy it will be difficult in many circumstances for the veteran to verify their role in combat. Poor recordkeeping and servicemembers being moved from one unit to another during their deployment could, under current VA internal requirements, make it impossible for a veteran to prove they engaged in combat with the enemy.

Therefore, AMVETS suggests that either the language be changed to more clearly define who and under what circumstances veterans would be granted presumption or amend section 1101, Title 38 United States Code to clarify who has engaged in combat and to what degree they must support their claim. This would take the subjective nature of the presumptive claim out of the adjudicator's hands.

AMVETS supports section 102 of the Act that will allow for parity between mental health disabilities and physical disabilities. Under the current rating schedule, VA decisionmakers often only focus on occupational impairment and not social impairment when awarding a 100 percent disability rating. AMVETS would support any provision that would require rating specialists to consider both mental and/or physical disabilities as grounds for disability ratings.

AMVETS also supports the study of using codes that are being used by the medical and disability profession as a model for the VA rating code. There are less than 800 diagnostic codes used by VBA and more than 10,000 ICD codes in use. Because of this, it will be imperative that some sort of cross reference be established to simplify the change.

Concerning section 103, AMVETS supports the study concerning the work credit system within the VBA, and had testified in the past of the need for change in the current work credit system. AMVETS believes that with quality assurance added to the Systematic Technical Accuracy Review (STAR) program oversight of accuracy of decisions will improve the accountability system.

AMVETS supports any effort to improve the quality of claims processing as presented in section 104. However, a study on the work management system may not be necessary if sections 103 and 105 are correctly implemented.

AMVETS wholly agrees with the creation of certification of employees of the VBA who are responsible for processing claims as outlined in section 105. AMVETS has testified in the past that not only certification, but centralized training and continuing education are important to ensure timely and accurate claims processing. AMVETS believes a large portion of the claims disparities are related to not only the lack of certification but also the human factors that vary from one region to the next. Centralized training will remove a considerable amount of the personality that has been established in these regions. Also, in all medical-related fields continuing education is required. New medical discoveries can change the way a claim is developed. If the developer is unaware to the changes, the veteran will be denied a claim; Therefore, AMVETS supports the idea of continuing education training for VBA employees who handle claims.

With regard to section 107, AMVETS has concerns not with outside agents developing claims, but with their ability to access information. VBA employees have access to documents that are not accessible by non-employees. Although the development phase of the claims process would be expedited, it would also increase the rate

of remands because of the claims that are improperly developed by those outside the VBA.

AMVETS opposes the study and report on employing medical professionals to assist employees of Veterans Benefits Administration. This would build in redundancy in the system, because VBA staff already has access to medical professionals who can answer any questions. Most claims complications are legal in nature, not medical; therefore, the medical professionals would be giving legal not medical advice in many instances.

AMVETS does not oppose section 109.

As outlined in section 110, AMVETS has publicly supported the use of electronic claims filing. AMVETS must reiterate that Information Technology must be used throughout the entire claims process to shorten the claims process.

AMVETS supports section 111 with exception to the substituting party may designate who receives the benefits of the original claimant.

AMVETS continues to support the provision outlined in section 201.

The matters relating to the United States Court of Appeals for Veterans Claims as outlined in sections 301 and 302 are supported both by AMVETS and the *Independent Budget*.

Chairman Hall, this concludes my testimony. I am happy to respond to any questions the Subcommittee may have.

Prepared Statement of Rose Elizabeth Lee
Chair, Government Relations Committee, Gold Star Wives of America, Inc.

Thank you for this opportunity to submit a Statement for the Record on behalf of the members of Gold Star Wives of America, Inc. (GSW).

GSW was founded in 1945 and is a Congressionally chartered Veterans Service Organization comprised of surviving spouses of military servicemembers who died while on active duty or as a result of a service-connected disability. GSW currently has approximately 10,000 members who are surviving spouses of those who served in World War II, the Korean war, the Vietnam War, the current wars in Iraq and Afghanistan and other smaller conflicts.

I have read through the draft issue of the **Veterans Disability Benefits Claims Modernization Act of 2008**, and its provisions are well crafted and much needed.

We are very happy that this proposed law specifically mentions survivors. Survivors have a unique set of benefits and a unique set of problems.

GSW requested that a few of our members who have personal experience in dealing with the Department of Veterans Affairs claims system and professional experience in converting manual business systems to computer systems read the proposed law and make suggestions and comments.

We are well aware that the Veterans Affairs claims system has a huge backlog of claims as well as a very long wait for processing. A large portion of this backlog is generated by having to file claims and appeals over and over again before they are properly and fully adjudicated. One surviving spouse's husband filed a claim five times before he died, and she has filed the same claim twice since he died. If the claims had been fully and competently processed, no more than two claims should have been required.

We fully support the provisions of this proposed legislation that call for proper training and certification of adjudicators. We would also like to see provisions that require that any rejected claim be reviewed by a knowledgeable, competent adjudicator before they are rejected or denied.

We also fully support all efforts to inform the claimant of the type and quality of information that the VA adjudicators need to properly process a claim.

Many of our servicemembers have participated in black or classified missions and in subsequent years they have developed illnesses as a result of those missions. In some instances portions of their service records are still classified or heavily redacted, and VA cannot adjudicate a claim without full access to those records. Some provision needs to be made to alleviate the situation whereby the claimant cannot receive compensation for his illness or injury because the records pertaining to it are classified or heavily redacted. It would seem reasonable to assume that if records are classified or heavily redacted, the claim should be adjudicated in favor of the claimant without the records that are usually required. The more cumbersome alternative would be that adjudicators to have a high enough security clearance to read the necessary records.

In the last few years GSW has encountered many surviving spouses who have filed for Dependents Indemnity Compensation (DIC) and have had a significant

delay in receiving benefits. Some of these survivors have lost or nearly lost their homes and/or their credit ratings have been lowered before the claim was processed and benefits were awarded. Many of these claims were very routine, straight forward claims which should have been processed quickly and easily.

Other surviving spouses have had to go without medical care or go heavily in debt to obtain medical care because the DIC claim was not processed expeditiously or the surviving spouse was not properly entered into the ChampVA system.

GSW also has many members who are unaware that they are entitled to a military identification card for commissary and exchange privileges if their deceased spouse was 100 percent disabled veteran and they are eligible for DIC. These surviving spouses are not receiving the information or the required letter from the VA. Additionally, the personnel in the military who are supposed to issue the identification cards do not know how to get the information into the various computer systems as required and therefore cannot issue the identification cards.

Temporary Aid and Attendance awards should be available for the surviving spouse and dependent children of a 100 percent totally and permanently disabled veteran or deceased veteran whose surviving spouse is entitled to DIC. These awards would be applicable in cases of catastrophic illness, surgeries where the anticipated length of recovery is greater than 10 days, chemotherapy, etc. Actual payments could be prorated to the actual recovery time involved.

If the condition becomes permanent, the Aid and Attendance could be continued on a permanent basis. Surviving spouses and dependent children should be allowed to claim housing modifications if the condition is permanent and the modifications are necessary.

Temporary Aide and Attendance is a real necessity for the surviving spouse and dependent children as there is only one parent and one adult in the household once the veteran dies.

In reference to:

(Page 14) **Advisory Committee on Disability Compensation**, GSW would like to have one of our well qualified members included on this Committee. ***The needs of family members and survivors also need to be addressed by this Committee***.

(Page 15) Title 1, section 102. "assemble and review relevant information relating to the needs of veterans with disabilities". Please add ***their families and survivors***. The needs of families and survivors also need to be addressed.

(Page 16) Title 1, section 102. "An assessment of the needs of veterans with respect to disability compensation". Please *add* ***their families and survivors***. The needs of families and survivors also need to be addressed.

(Page 21) Title 1, section 105. **Employee Certification**. This employee certification examination for adjudicators needs to ***include DIC claims and survivor benefits***.

(Page 24) Title 1, section 106. **Annual Assessment of Quality Assurance Program**.

It is our understanding from comments made at other hearing that there is a great deal of difficulty involved in training and certifying adjudicators. One comment was made that only 27 percent of the adjudicators could pass the certification exam; another comment was that adjudicators remained in their positions for only about 2 years. With the vast amount of knowledge needed to perform adequately in these positions and with this difficulty in training and retaining adjudicators, some thought needs to be given to raising the grades of these employees and to creating upward mobility positions. Perhaps the adjudicators could be monetarily rewarded or promoted to the next level on an upward mobility path based on passing the examinations.

Different regional offices often rate veterans with similar illnesses and injuries very differently. Hopefully the reports required by this legislation and the certification examinations will allow the regional offices to rate veterans with similar illnesses and injuries in a more equitable manner.

(Page 29) Title 1, Sec 109. **Assignment of Temporary Disability Ratings to Qualifying Veterans**.

When a claim is incomplete and a checklist is provided to the claimant will there be time constraints involved? If there are time constraints involved, can those time constraints be extended if, through no fault of their own, the claimant cannot comply with the time constraints?

Veterans who have been declared terminally ill should be included in the provisions for Temporary Disability Ratings. There should be a specific set of procedures for terminally ill veterans. Pending claims should automatically be expedited without the need for a special request.

In the case of a terminal diagnosis stemming from a previously rated service connected disability, the veteran should be rated as 100 percent totally and permanently disabled from the date of the original claim.

(Page 30) **Qualifying Veteran**. "(1) who has been discharged from active duty service for 365 days or less."

And on (Page 31) **Termination of Temporary Rating** (B) "The date that is 365 days after the date of the veteran's last separation or release from active duty."

The two dates specified above could be the same or very close to each other. Perhaps it would be better to specify under Termination of Temporary Rating that the Temporary Rating would be terminated 365 days after it was received or 365 after the first temporary compensation check was mailed.

(Page 32) Sec 110. **Review and Enhancement of Use of Information Technology at Veterans Benefits Administration**.

Security of online records should be a prime consideration. All access to those records should be logged and the reason for that access specified. Digital signatures should be provided for all access and a record kept of what information was accessed and why it was accessed. All HIPPA provisions should be used to safeguard the information in these records.

A veteran should have access to his own records. A copy of the records should be provided to the veteran upon request without charge. If a surviving spouse requires access to the deceased veteran's records, a copy of those records should be provided without charge.

If there is incorrect information in the records, it should be corrected upon request of the veteran.

If a veteran's record is included in the registries (cancer, Agent Orange, Gulf War, etc.) the veteran should be advised that the record is being included in these registries and how the data in those registries will be used.

If a veteran's record is used for research all identifying data should be stripped from the record. If for some reason all identifying data cannot be stripped from the record, then written approval of the veteran to use the information in his records should be required.

(Page 36) Sec. 111. **Substitution in case of death of claimant**.

Minor dependent children should automatically be considered as co-claimants, if the claimant of record is not the custodial parent. This will ensure that the original claimant's minor dependent children are not forsaken in lieu of a current spouse or in the cases of a guardianship or custodial grandparents. The dependent child or children's financial interests are then protected until the reach the age of majority.

Prepared Statement of Richard Paul Cohen
Executive Director, National Organization of Veterans' Advocates, Inc.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present the views of the National Organization of Veterans' Advocates, Inc. ("NOVA") on the "Veterans Disability Benefits Claims Modernization Act of 2008."

NOVA is a not-for-profit §501(c)(6) educational organization incorporated in 1993 and dedicated to train and assist attorneys and non-attorney practitioners who represent veterans, surviving spouses, and dependents before the Department of Veterans Affairs ("VA"), the United States Court of Appeals for Veterans Claims ("CAVC") and before the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

NOVA has written many *amicus* briefs on behalf of claimants before the CAVC and the Federal Circuit. The CAVC recognized NOVA's work on behalf of veterans when it awarded the Hart T. Mankin Distinguished Service Award to NOVA in 2000.

The positions stated in this testimony have been approved by NOVA's Board of Directors and represent the shared experiences of NOVA's Members as well as my own fifteen-year experience representing claimants at all stages of the veteran's benefits system from the VA Regional Offices to the Board of Veterans' Appeals to the CAVC as well as before the Federal Circuit.

Overall, NOVA supports the provisions contained in the "Veterans Disability Benefits Claims Modernization Act of 2008" ("the Act"). The legislators and their staff are to be commended for their concerted efforts to fix and update the VA's benefits system. However, NOVA has suggestions regarding various sections. Accordingly, this statement will deal with the sections of the Act seriatim.

NOVA recognizes the intent behind section 101; that is, to provide significant assistance to veterans who have been diagnosed with PTSD after military service and who were in a combat zone where they were exposed to "stressors", but who have difficulty proving they "engaged in combat with the enemy" due to the nature of their military service. However, as it exists now, section 101 will not bring about its intended purpose. At present, 38 U.S.C. § 1154(b) does not provide a presumption that a veteran is entitled to benefits for a service connected injury or disorder even for those veterans who the VA concedes engaged in combat with the enemy. Rather, 1154(b) has been interpreted as providing only a presumption of service incurrence which still requires proof of medical nexus, *Dalton v. Nicholson*, 21 Vet. App. 23 (2006).

In order to accomplish the intended result, section 101 needs the following addition at line 22 of p. 6:

> "(3) by adding at the end the following new paragraph:
> '(3) In the case of a veteran who has been diagnosed with PTSD after military service and who engaged in combat with the enemy as defined in (2) above, a connection between PTSD and active military service shall be presumed and may be rebutted only by clear and convincing evidence to the contrary.'

It would be an obvious inequity to apply this liberalizing change only to pending claims, thus excluding veterans who saw considerable combat in a theater of combat operations, but are unable to prove it. Accordingly, the effective date provisions, p.6, line 24, et.seq., should state that this section is to be applied retroactively.

Concerning section 102, NOVA supports adjustment of the schedule of ratings and ensuring parity between the rating of mental and physical disabilities, especially regarding total disability. Additionally, NOVA supports the Veterans' Disability Benefits Commission's two specific recommendations (4.1 and 7.6) that veterans receive an immediate 25 percent increase in disability payments for loss of or impairment in quality of life. Accordingly, NOVA recommends inserting a new section 102(b) which would specifically require a 25 percent increase in current disability payments to reflect the loss or impairment in quality of life and that proposed section 102(b) be renumbered 102(c).

Concerning section 102(d), NOVA supports the creation of an Advisory Committee on Disability Compensation and suggests that the eighteen Committee members include 1–2 veteran advocates from the private sector. Such inclusion will ensure that the issues integral to veterans' disability compensation are considered from all relevant perspectives.

NOVA supports, generally, sections 103 and 104, regarding the VA's work credit and work management systems, respectively and supports the suspension of the work credit system upon failure of the VA to implement a replacement system within a stated timeframe. Although it may seem draconian to require suspension of the work credit system, NOVA has, by citing to the 2005 OIG report in our prior testimony, highlighted the effect of rewarding the quantity versus quality of decisions made and its impact on the VA's backlog. For obvious reasons, NOVA recommends that the mandated studies should be performed by either the Office of Inspector General or the Government Accounting Office, rather than by the VA.

NOVA supports section 105 to the extent that it requires certification and training of VBA employees. NOVA notes an apparent typographical error at p.21, line 23 which should read "§ 7735 Employee Certification and Training." Substantively, NOVA recommends inserting a specific training requirement by amending Line 25, et seq, to read as follows: "The Secretary shall provide appropriate semi annual training sessions of 10 hours each involving VA regulation and Court decisions for appropriate employees and managers of the Veterans Benefits Administration and shall require such employees. . . ."

NOVA supports section 106, Annual Assessment of Quality Assurance.

Although NOVA generally supports section 107, Expedited Treatment of Fully Developed Claim, because of the value of expeditiously deciding claims that require no further development, NOVA is wary of the language contained in page 28. Specifically NOVA foresees the likelihood that VA may utilize this language to support the assertion that the unsuspecting veteran waive the right to adequate development of the claim. In many cases, a veteran who is not represented by an attorney or a well-trained veteran's advocate is not fully aware or informed of the legal significance of a waiver. To require the veteran waive further assistance or development is a dangerous, ill-advised procedural short-cut.

NOVA questions the feasibility of section 108, the use of medical professionals to assist VBA employees, because of the danger that the medical professionals may—by default and, or contrary to the intent and language of the statute—become the

person who rates and evaluates the claim. Moreover, there is a strong likelihood that the selected medical professional will be from QTC, a company with which VA contracts to conduct medical evaluations. However, veterans repeatedly report to NOVA Members that QTC-employed medical professionals perform medical examinations that tend to be inadequate, deficient, unprofessional and, or biased. Thus, if medical consultants are to be utilized, the statute should specifically require that all communication (written and oral) between VBA employees and the medical consultants be documented, available in the VA claims file, and the veteran be notified that such consultation was part of the development and, or adjudication of their claim.

While suggesting the use of medical consultants, Congress should also recommend that the VA implement a "treating physician's rule" similar to that which as has been enacted by the Social Security Administration ("SSA"). The SSA treating physician rule contained in SSR 96–2p: http://www.ssa.gov/OP_Home/rulings/di/01/SSR96–02-di-01.html provides that if a treating source's medical opinion is well-supported and not inconsistent with the other substantial evidence in the record, then it must be given controlling weight, i.e., it must be adopted.

Recognition by the VA that treating physicians have unique insight into the veteran's medical condition(s) is long overdue. A treating physician rule would be beneficial to both the veteran and the VA. The veteran benefits because the opinion of the medical professional with the most complete knowledge about the veteran's condition would be given "greater weight" and would provide the VA decisionmaker with valuable information regarding the etiology and, or severity of the veteran's medical condition. The treating physician would also help counter the opinion of a VA physician who examined the veteran on only one occasion and typically for less than 30 minutes. The VA would also benefit because claims for VA benefits would be decided more efficiently since any issue regarding conflicting medical reports would be resolved easily by using a treating physician rule.

Partial disability ratings which are contained in section 109 are supported by NOVA.

NOVA supports that portion of section 110 which provides for automated decision support software and electronic examination templates. However, although NOVA questions the utility of utilizing Artificial Intelligence, the ability of the veteran to check on the status of a claim on the web, contained in (b)(7) is a good idea.

Section 111, involving substitution where claimant dies while a claim is pending is long overdue. NOVA assumes that the intent is to apply § 5121A to claims which are pending in the Court or before the VA, and to eliminate uncertainty in that regard, recommends that the language "before the VA or a Court" be inserted at page 36, line 6, after "adjudication." NOVA also recommends deleting the language at lines 6–7, "the person who would receive any accrued benefits" and substituting the language "the person who would receive any accrued benefits or the adult children of the claimant". This revision would hopefully correct the current disparate treatment experienced by adult children when their mother or father has predeceased the veteran, thereby precluding any family member from being eligible to receive accrued benefits.

In view of its status as an Article I Court, and the resulting need for Congressional oversight, NOVA supports the reporting requirements imposed upon the CAVC which are contained in section 201. Additionally, NOVA recommends that the court be required to report on the time that elapses from when the case is fully briefed until the Court renders its disposition.

NOVA also supports section 202. Moreover, NOVA views the deleted provisions requiring the Court to decide all assignments of error raised by an appellant as appropriate and essential. This provision is appropriate because of the CAVC's status as an Article I Court, and is essential because, as NOVA has asserted on previous occasions, the CAVC's practice of narrowly deciding appeals is a major contributing factor to veterans' repeat visits to the Court and to the Court's ever-increasing caseload. This provision may appropriately be founded on the distinction between this Article I Court which renders narrow decisions in cases which frequently return to the Court raising the same errors, and Article III Courts which tend to decide appeals containing one issue which is unlikely to return. Finally, to deal with the Court's concern about unnecessarily being required to decide Constitutional claims the following language could be inserted in the provision dealing with the *Best/Mahl* issue: "except that Constitutional arguments need not be decided if the appeal could be resolved by deciding the other assignments of errors raised."

Prepared Statement of Richard Weidman
Executive Director for Policy and Government Affairs
Vietnam Veterans of America

Vietnam Veterans of America (VVA) is pleased to submit this Statement for the Record concerning the discussion draft of a bill to be entitled the "Veterans Disability Benefits Claims Modernization Act of 2008."

Certainly, no one can object to the purpose of this legislation: "to ensure the accurate and timely delivery of compensation to veterans and their families and survivors." In its findings, Congress has identified the crux of the problem: "The paper-based, labor-intensive [system of rating claims] employed by the Department [of Veterans Affairs] leaves many disabled veterans and survivors waiting months or years to receive the benefits they have earned."

Nor can one dispute the premise of this bill: that the VA "must modernize the claims processing system of the Veterans Benefits Administration to make it a first-class, veteran-centered system that uses 21st century technologies and paradigms and reflects the dignity and sacrifices made by disabled veterans, their families, and survivors."

However, we caution that any legislation needs to take into account two factors. First, what we will call the "null hypothesis," that the laws as currently written are not inadequate; rather, the culture, processes, and regulations of the VBA, and its personnel, are the culprits behind the unconscionably long list of claims awaiting adjudication and the time it takes to rate them. And second, that the regulation re-write project currently being undertaken by VA personnel may embrace many of the recommendations of this legislation, as well as offer other recommendations that ought to be included in any legislation enacted by Congress.

Be that as it may, we will offer comments relevant to various sections of the proposed legislation.

Section 2. Findings

(1) In referring to the "nearly 24,000,000 American veterans," it is perhaps more appropriate to say "veterans in America." Currently foreign nationals serving in the American military number in the hundreds if not thousands; upon discharge from active service, they do not automatically become "American veterans."

(12) Of the 345,713 veterans whom the Veterans Health Administration treated for Post Traumatic Stress Disorder (PTSD), how many have filed claims for disability compensation? How many were informed by VA staffers that they, in fact, could file?

(16) Nowhere in this section is it noted that the VA fails to consider cost of living differentials. Other Federal departments in fact do use locality pay.

Title I—Matters Relating To Modernizing the Disability Compensation System of [the] Department of Veterans Affairs.

Sec. 102. Study on Readjustment of Schedule for Rating Disabilities.

VVA has no objection for the Secretary of Veterans Affairs to commission a study "on adjusting the schedule for rating disabilities . . . so as to base the schedule on standards, practices, and codes in common use by the medical and disability profession[s]."

While this section notes that the Secretary ***may*** enter into a contract (page 7, line 14), this seems at odds with the language on page 9, lines 5–9, to wit: "In conducting the study . . . the Secretary ***shall*** consult with appropriate public and private entities, agencies, and veterans service organizations, and ***shall*** employ consultants."

VVA agrees with the determination of previous reports of relevant commissions that the ratings schedule should be adjusted "to take into account the loss of quality of life and loss of earnings that result from specific disabilities."

(1) On line 12, the word "profession" should be plural: ". . . the medical and disability professions that. . ."

(2)(C) We question, however, why direct a study to "examine whether disparities exist" with PTSD and other mental disabilities and not with other disabilities?

(E)(iii) We would request clarification of this provision regarding "the extent to which benefits for veterans may be used to encourage veterans to seek and undergo vocational rehabilitation." It seems to us that this language is loaded for misinterpretation.

(5)(B) There seems to be a misstatement of fact here, inasmuch as 1155 does ***not*** currently consider "the loss of quality of life." Certainly, any fix, or "modernization" of the disability benefits system needs to incorporate a measure to embrace quality of life.

(5)(H) VVA agrees with providing, "to the maximum extent possible, the benefit of the doubt to veterans . . . in the absence of official military records pertaining to the service-connection of a veteran's disability, and in particular, of post traumatic stress disorder, when a determination of service-connection would be consistent with the duties, conditions, and hardships of service in the Armed Forces." More importantly to note, however, is that the regulations pursuant to section 1154 of title 38, United States Code, are in fact "consistent." The problem lies in that they are ***not*** applied consistently.

(b)(1) Requiring the VA Secretary to submit to Congress "a plan to readjust the schedule for rating disabilities" in 120 days imposes a very tight deadline. If VA personnel are to get it right and do it right the first time, the VA must be accorded a more reasonable amount of time in which to prepare this plan.

(b)(1)(A) Aligning the schedule with "best practices" needs leeway in the instance that a new treatment modality requires testing before the VA can consider employing it.

(b)(1)(D) We are not quite sure just what the term "automated" means. We do believe, however, that a creative use of modern electronic technology can be applied in the adjudication of claims, particularly in the realm of ensuring that all facets, or sections, of a claim are properly completed so that a rater can make a determination as to the viability of a claim and what percentage of disability ought to be granted.

(c)(2) The 3-year timeline for when the VA Secretary intends to readjust the schedule is, we believe, unrealistic. Because of the potential for massive changes, for the need for notice and comment periods, this timeline should be extended based on input from VHA personnel and VSO service representatives who can offer their expert opinion.

546. Advisory Committee on Disability Compensation.

VVA is particularly pleased as to the charge to the VA Secretary, who "shall seek to ensure that members appointed to the [Advisory] Committee [on Disability Compensation] include individuals from a wide variety of geographic areas and ethnic backgrounds, individuals from veterans service organizations, individuals with combat experience, and women." This is a critical provision if the work and determinations of said committee are to be respected by the veterans community at large.

(a)(2)(B) Language should be changed from "or" to "and/or" to wit: "have experience with the provision of disability compensation by the Department and/or are leading medical or scientific experts in relevant fields."

(b)(2)(B) VVA believes that language pertaining to dependents and survivors "of veterans who have served in a theater of combat operations" needs to be included in this provision; also, to add ". . . veterans who have served in a theater of combat operations or area of hostilities as determined by DoD and the VA."

(c)(1) A clause on benefits due the survivors of veterans ought to be included in this section.

Sec. 103. Study on Work Credit System of Veterans Benefits Administration.

(b) There is too much wiggle room in language that specifies only that "the Secretary shall consider the advisability of implementing—" This provision must be made mandatory for it to be effective.

(b)(3) Why note two "classes" of veterans, the "severely injured" and the "very severely injured"? What about others who have been disabled to a lesser, or even greater, extent, e.g., "catastrophically injured"?

(c)(1) We are not convinced that a "new system" is required "for evaluating the work production of employees" of the VBA. The bottom line is that the VBA needs enough experienced raters—and supervisors—to handle the ever-increasing caseload. And these employees need the training and supervision to enable them to be productive, to meet realistic goals. Now, raters seemingly are caught between the proverbial rock and hard place: they are asked to accurately rate more cases faster.

(d)(1)(C) Potential danger lurks in this language. As VVA has testified before the Veterans' Disability Benefits Commission, the "null hypothesis" needs to be considered: What if the current system of laws and regulations really is valid and workable, but that the issue is, and problems arise because, the system is improperly implemented?

We might suggest adding language that directs VBA supervisors to properly triage cases for adjudication. For instance, a relatively simple claim for tinnitus that comes in with all fields appropriately filled out ought not take more than 60 days to be processed fully.

We might suggest, too, that the VBA be required to use experienced raters to handle complex, multi-faceted cases, with teams of raters attuned to mental health issues assigned to handle PTSD and other mental health claims.

Sec. 104. Study on Work Management System.

In this section, VVA harkens back to our null hypothesis. The VBA already has, but does not use, "a simplified process to adjudicate claims" [(b)(3)]. The VBA also has laws, rules, and regulations for "rules-based applications and tools for processing and adjudicating claims efficiently and effectively" [(b)(5)].

Attempting to develop "methods of reducing the time required to obtain information from outside sources" [(b)(6)] is complicated by the fact that stressor research is a major problem, one that cannot be "fixed" by a prescription in a provision.

Sec. 105. Certification and Training of Employees of [the] Veterans Benefits Administration Responsible for Processing Claims.

7735. Employee Certification.

(b) VVA suggests that the Secretary shall require ***all*** employees and managers, not only "appropriate employees and managers . . . responsible for processing claims for benefits under the laws administered by the Secretary" to take a certification examination. VVA submits, further, that VSO, state, and county service representatives should be required to take a certification exam as well.

Also, just what does the term "processing" mean here in context? Does this include the copy clerks who run the copy machine?

(c) Again, let's not sweep out all facets of the current disability benefits system. Part of the consideration must be questions as to the efficacy of implementation of laws and regs currently on the books.

(c)(2)(B) This needs to be rewritten into readable English. After reading it and rereading it, we still are not quite sure as to its meaning.

Sec. 106. Annual Assessment of Quality Assurance Program.

(c)(1)(E) Assessing the performance ought not be limited to employees and managers of the VBA. Contractors and consultants should be added to this provision.

Sec. 107. Expedited Treatment of Fully Developed Claims and Requirement for Checklist to be Provided to Individuals Submitting Incomplete Claims.

5109C. Expedited Treatment of Fully Developed Claims.

(a) A fully developed claim ought to take well under 90 days to adjudicate. Perhaps this needs to read to the effect that initially such a claim must be completed within 90 days. Within 2 years(?), however, this must be reduced to 60 days, an eminently reasonable amount of time.

(b) What if claimant waives his/her rights?

(c)(1)(A) The assumption that a claim will be fully developed if a claimant has "received assistance from a veterans service officer, a State or county veterans service officer, an agent, or an attorney" is misplaced. Such representation simply does ***not*** ensure that a claim is fully developed. The reality is that just as there are service officers, agents, and attorneys who are competent and dedicated, there also are service officers, agents, and attorneys whose competence and knowledge must be questioned. (This is another reason why these folks should be required to take, and pass, a certification exam.)

(c)(1)(B)(2) In addition to said certification being signed by a claimant, his/her service representative should also be compelled to sign as well, sort of like your accountant does who prepares your taxes.

Sec. 108. Study and Report on Employing Medical Professionals to Assist Employees of [the] Veterans Benefits Administration.

(a) It should be noted that the VBA already uses the services of these professionals. And the term "medical professionals" ought not be repeated four times in the first sentence in this clause.

Sec. 109. Assignment of Temporary Disability Ratings to Qualifying Veterans.

1156. Temporary Disability Ratings.

VVA endorses the concept of assigning temporary disability ratings. Because this provision has the potential for abuse, it must be carefully structured and enforced. We do question, though, why a "qualifying veteran" is one who "has been discharged from active duty service for 365 days or less" [(b)(1)]. Why limit this to 1 year?

(d)(2) Placing a 30-day time limit for VA personnel to "review each pending claim for disability compensation . . . [to] determine whether the claimant submitting each such claim is entitled to a partial disability rating" is a bit restrictive and could prove quite onerous and could even hamstring the VA. How many such claims are there?

Sec. 110. Review and Enhancement of Use of Information Technology at Veterans Benefits Administration.

(b)(1) VVA endorses the use of "rules-based processing and information technology systems and automated decision support software at all levels of processing claims." Appropriate software can, we believe, be developed expeditiously—or can be adapted from software currently available. Even with the inevitable kinks in introducing such IT into the claims adjudicating and rating process, this is an initiative that ought to be undertaken. It is past time for the VBA to enter the 21st century.

(b)(3) "Survivors" needs to be added to the litany of active-duty members of the Armed Forces, veterans, and their dependents.

(b)(7) VVA is particularly supportive of making available "on the Internet Website of the Department, of a mechanism that can be used by a claimant to check on the status of any claim submitted by that claimant."

Sec. 111. Treatment of Claims Upon Death of Claimant.

5121A. Substitution in Case of Death of Claimant.

(a) VVA endorses the proposal that, if "a veteran who is a claimant dies while a claim for any benefit under a law administered by the Secretary is pending and awaiting adjudication, the person who would receive any accrued benefits due to the veteran . . . shall be treated as the claimant for the purposes of processing the claim to completion." We believe, however, that placing a cut-off of 1 year from the date of the veteran that such person may only submit new evidence in support of the claim is too restrictive. For example, it can take far longer than 1 year to obtain a copy of a ship's deck log for a specific date.

(b) What if two individuals are eligible?

Title II—Matters Relating to United States Court of Appeals for Veterans Claims.

7288. Annual Report

(10) With regard to "the number of cases pending longer than 18 months," the Court should be required to enumerate the reasons why these cases have been pending for so long. Simply providing a number doesn't tell the whole story.

POST-HEARING QUESTIONS AND RESPONSES FOR THE RECORD

Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Washington, DC.
May 19, 2008

Mr. Bradley Mayes
Director
Compensation and Pension Service
Veterans Benefits Administration
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW.
Washington, DC 20420

Dear Mr. Mayes:

Thank you for your appearance before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs at the "Legislative Hearing on the Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892" held on April 10, 2008. As noted during the hearing additional questions for the record would be provided. Please answer the enclosed questions for the record by June 30, 2008.

In an effort to reduce printing costs, the Committee on Veterans' Affairs, in cooperation with the Joint Committee on Printing, is implementing some formatting changes for material for all full committee and subcommittee hearings. Therefore, it would be appreciated if you could provide your answers consecutively on letter size paper, single-spaced. In addition, please restate the question in its entirety before the answer.

Due to the delay in receiving mail, please provide your response to Ms. Megan Williams by fax at (202) 225–2034. If you have any questions, please call (202) 225–3608.

Sincerely,

John J. Hall
Chairman

Questions for the Record
The Honorable John J. Hall, Chairman
Subcommittee on Disability Assistance and Memorial Affairs
House Veterans' Affairs Committee

April 10, 2008

Veterans Disability Benefits Claims Modernization Act of 2008, H.R. 5892

Question 1: Thank you for sharing the IBM study with us that I requested at a previous hearing. Based on their gap analysis the IBM consultants made several short- and long-term recommendations that bear similarities to many provisions to this bill. Firstly, do you agree with all of these recommendations? If so, what are you doing to institute the IBM recommendations? What recommendations (if any) don't you agree with? Why?

Response: In concept, the Veterans Benefits Administration (VBA) agrees with all of the IBM recommendations. IBM provided a broad outline for implementation in the *Short Term Action Plan, Long Term Action Plan* document. VBA is developing a more detailed implementation plan and assigning responsibility for each of the short-term recommendations to specific staff. Responsibility for the recommendations includes developing an implementation approach and milestones, obtaining necessary resources/input from other offices, and briefing senior VBA leadership on the status of implementation. The long-term recommendations are being incorporated as VBA redesigns its processing in connection with its paperless initiatives.

Question 2(a): The studies you have ongoing regarding quality of life and earnings capacity losses and transition payments is on a fast-track for completion by July 2008, as I understand it. These studies will be presenting VA with options from which to choose. Do you intend to vet those options internally and externally? How will you judge their appropriateness, feasibility and effectiveness?

Response: The Department of Veterans Affairs (VA) will vet options presented by the contractor for the payment of quality of life, earnings loss, and transition payments internally with those entities that would be affected by such a process-altering change, e.g., Veterans Health Administration (VHA), VBA, the Office of the General Counsel and the Board of Veterans' Appeals (Board). It will be a comprehensive task to determine which of the options would be feasible to implement, both in terms of training and information technology (IT) requirements, and in terms of any statutory or regulatory changes that would be required. Once VA identifies feasible options that would best serve the needs of veterans, it will be vetted through our external stakeholders.

Question 2(b): In your testimony you mention that reliance on the ICD, DSM–IV and AMA Medical Guides will make the rating system unnecessarily complex. Yet this is a recommendation of the IOM, the VDBC and Dole-Shalala to some extent. How do you reconcile your position on readjusting and updating the VASRD with the opinion of so many other expert organizations?

Response: VA has used its *Schedule for Rating Disabilities* (VASRD), with modifications over time, since at least 1933. It contains approximately 800 unique diagnostic codes used to identify disabilities. The CNA Corporation, in its study for the Institute of Medicine and the Veterans' Disability Benefits Commission, found that there was "general parity overall" when comparing the earnings and benefits of disabled male veterans with the earned income of similarly situated, non-disabled veterans.

The ICD and DSM codes are composed of thousands of possible codes. We are gathering information concerning the implications of adopting such a system; however, we are concerned that increasing the number of diagnostic codes in the VASRD would introduce additional complexity into the VA disability evaluation system. The Compensation and Pension Service recently met with Dr. Robert Rondinelli, Medical Editor of the *Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment*. We also look forward to the findings and recommendations from the study of the VA disability compensation system.

Question 2(c): I know that you have contracted out to study quality of life, loss of earnings capacity and transition payments. Nonetheless, I still must ask, what is VA's plan for revising and updating the VASRD? Do you (VA) not think it needs to be readjusted, updated and aligned with modern medical concepts and practices on a comprehensive basis?

Response: The rating schedule is an evolving document, and VA understands the need to readjust and update it as medical understanding dictates. To that end, we are in the process of recruiting additional physicians for our regulations staff to assist in making timely changes to the schedule on a regular basis.

VA fully supports the concept that the VASRD should be current and aligned with modern concepts and practices. We are committed to achieving that goal. VA is revising the rating schedule as the need arises. The rating schedules for 12 of the 16 body systems has undergone a comprehensive revision over the past several years, and that revision was published in the Federal Register for public comment prior to final issue. The rating schedules for the additional body systems are either awaiting publication in the Federal Register or are in concurrence within VA. Additionally, VA has in concurrence revisions to the neurological system schedule for evaluating traumatic brain injuries.

Question 3: It is clear to me that VBA needs to end or revise its work credit system immediately. It is task-based, but not outcome-oriented and seems to the faulty underpinning for the lack of accountability in the claims processing system. This may have been a good concept at some point, but as the backlog increases and delays mount, it is no longer a suitable means to track your work output/production or success either in processing claims or as a means of holding employees or managers accountable. The Veterans Health Administration hospitals must comply with several outcomes based protocols. Have you looked at how VHA does its oversight or other workflow accountability models? Is there any room for adaptability to the VBA, especially as you move to a Virtual VA platform and other "One VA" initiatives?

Response: VA has a process in place to hold both employees and regional office directors accountable for work production. Depending on their position, employees are responsible for specific tasks within the claims process and are evaluated on performance of those tasks. Conversely, regional office directors are evaluated on outcome measures of station output and quality of total claims processed. VA evaluates both individual employee performance and director performance against national performance standards established for their respective positions.

We will look at the VHA methods you have mentioned, to determine to what extent they are transferable.

Question 4(a): You disagree with section 107 of the bill indicating that section 107(a) is duplicative of what VA is currently doing, which was intended to deal with some of the issues surrounding the VA's duty to notify—please describe your fast-track procedures. Who uses it and how is it activated?

Response: In certain situations, VA is able to fast-track claims to improve the efficiency of benefits delivery. When a Veterans Service Center employee reviews evidence submitted with certain claims and observes that it is adequate to grant the benefit sought, they can immediately refer the claim for a decision. In addition, letters that fulfill VA's duty to inform and assist under the Veterans Claims Assistance Act (VCAA), as codified at 38 U.S.C. §§ 5103 and 5103A, include attachments describing the evidence or action(s) needed to fully develop a claim. The letters also encourage claimants to complete and return an enclosed *VCAA Notice Response*, in which the claimant can notify VA that they have no further information to submit, and that VA should decide the case as soon as possible, after all required development is completed, rather than waiting 30 days, as required by regulation. Further, VA routinely expedites applications received from such claimants as former prisoners of war, the homeless, the terminally ill, and veterans who served in Operation Enduring Freedom or Operation Iraqi Freedom.

Question 4(b): It seems that your main concern with section 107(b) is that the court may interpret it to expand VA's duty to assist and notify. You inform that there are three types of claims that VBA receives. Doesn't it make sense to develop a checklist that is generic enough to use for every claim and can be made specific enough to properly inform the veteran of what he is expected to give to the VA to help adjudicate his claim? I believe your personnel already go through a mental checklist in order to develop claims anyway. In fact your development is a form of pre-adjudicating because as you stated before, if there is enough evidence to rate a claim, you will. When there is not, VCAA notice goes and I believe at that point the veteran is entitled to and VA should be required to inform what is needed to adjudicate the claim.

Response: The VCAA letter already informs claimants what information and evidence is needed to substantiate their claims, as well as what claimants need to provide to substantiate their claims and what VA will obtain. The letter also asks claimants to provide VA with any pertinent evidence in their possession. The computer application used to generate the VCAA/development letters creates a checklist for VA employees to attach to the claims folder. The checklist summarizes the claimant's application, shows the pending type and source of development, and shows the date followup action should be taken. The checklist is automatically updated each time an employee performs a subsequent development action or receives evidence. Development on the claim is complete when all of the evidence is either received or the time limit for submission of evidence has expired.

This checklist is not given to the claimant because it would be redundant of information already in the VCAA letter. The checklist would also require explanation to be meaningful thus lengthening the letter. Mandating a checklist that would provide "a detailed description of information or evidence required to be submitted by the claimant to substantiate the claim," and communicates effectively is difficult and could not be provided at the initial point in the claims process, when the VCAA requires VA to provide notice, because VA does not yet know what kinds of specific evidence are needed to substantiate the claim. Also, in light of the recent decision in *Vazquez-Flores*, requiring VA to notify an increased-rating claimant of the criteria necessary for a higher rating listed under a previously assigned or cross-referenced diagnostic code, when those criteria would not be satisfied by the claimant demonstrating that their disability generally has worsened or adversely affected his occupation and life, the utility of a checklist becomes even more problematic and unlikely to withstand court scrutiny.

Question 5: Would you elaborate on the difference between prestabilization and temporary ratings and where I can find the authority for each, either in statute or regulations? Would receipt of temporary rating impede the final rating process or decision for a veteran's claim?

Response: Prestabilization Ratings: Under 38 CFR § 4.28, VA will assign a prestabilization rating of 50 percent or 100 percent for severe symptoms of an unstabilized injury or disease or unhealed or incompletely healed injury or wound. Prestabilization ratings are assigned for the 12-month period immediately following separation from military service and provide a period of benefits during which the unstabilized or incompletely healed injuries are expected to stabilize or heal completely. Prestabilization ratings are provided to assure earliest payment to veterans separated from service who have a significant disability at a time when they are most likely in need and least likely to be self-sufficient. A mandatory examination is to be scheduled not earlier than 6 months nor later than 12 months following the

date of discharge. If, as a result of the examination findings, a reduction in evaluation is warranted, the prestabilization evaluation will continue until the last day of the 12th month following discharge or the expiration of the 60-day period provided under 38 CFR § 3.105(e) for reduction in evaluation, whichever is later.

Temporary Total Ratings:

> Hospitalization: Under 38 CFR § 4.29, VA will assign a temporary total evaluation when a service-connected condition requires hospitalization for a period in excess of 21 days for treatment or observation and a 100 percent rating cannot be assigned under other provision of the rating schedule. The temporary total rating is effective the first day of hospitalization and continues through the last day of the month during which hospital discharge occurred. If the treatment during hospitalization requires a period of convalescence, this evaluation may be continued up to 6 months. The effective date of termination of this temporary period of total evaluation is assigned prospectively and not subject to the due process provisions of 38 CFR § 3.105(e).
>
> Convalescent periods: Under 38 CFR § 4.30, VA will assign a temporary total evaluation, without regard to other provisions of the rating schedule, when it is established by competent medical evidence that a period of convalescence is required following hospital care, surgery or treatment requiring immobilization by cast of one or more major joints, for a service-connected disability. This temporary total evaluation for convalescence is effective the date of hospital admission or outpatient treatment and may be continued for a period of up to 1 year. The effective date of termination of this temporary total evaluation is assigned prospectively and is not subject to the due process provisions of 38 CFR § 3.105(e).

The assignment of prestabilization ratings or temporary total evaluations under either 38 CFR § 4.28, 4.29 or 4.30 creates no impediment to the final rating process or decision on a veteran's claim.

Question 6(a): In 2006, approximately 250,000 veterans and survivors began receiving compensation, pension, and DIC benefits. Can you tell us how many of the total universe of compensation claims applications received (approximately 600,000) were denied? How is the VA currently keeping track of denied claims? Of the nearly 1 million claims you are expecting to receive in FY08, what percentage based on past figures do you anticipate will be claims for adjustments and how many will be original claims? How will you track the denials?

Response: We are unable to provide the number of compensation claims that were denied in 2006. VA does not track denials because of the complicated nature of compensation claims. Claims for service connection may be for one disability or many disabilities. When more than one disability is claimed, some disabilities may be granted, and others denied. A veteran may also reopen a denied claim and provide additional evidence that allows VA to grant service-connection. Additionally, service connection may be granted, but the evaluation assigned is 0 percent or does not result in an increase to the veteran's combined evaluation.

In fiscal year (FY) 2006, VA received more than 806,000 compensation claims. Of those received 280,000 were original claims from first time-filers and 525,000 were reopened claims for increased compensation or reconsideration of a previously denied claim. During FY 2006, VA completed almost 800,000 compensation claims, including 272,500 original claims and 526,000 reopened claims.

VA estimates that we will receive approximately 855,000 compensation claims in FY 2008. In both FY 2006 and FY 2007, approximately 35 percent of receipts were original claims. If that holds true for FY 2008, we will receive almost 300,000 original claims.

Question 7: Can you inform whether VETSNET is going to be interoperable with DFAS?

Response: The VETSNET suite of applications currently functions independently of DFAS payment systems. Over the past year, both VA and DFAS have exchanged access privileges to their respective data systems. VA employees can access the DFAS system, and DFAS employees can access VA's system. There are also several VA/DFAS data exchanges in place and several planned for the future. During the course of a month, VA and DFAS exchange several different data files regarding disability compensation benefits that military retirees receive. These files are used to determine eligibility to VA disability compensation, military retired pay, combat-related special compensation (CRSC), concurrent receipt disability pay (CRDP), and other benefit programs.

Future data exchange plans include data files identifying military retirees, dependency and indemnity compensation recipients also entitled to survivor benefit payments, combat-related disability severance pay recipients and CRSC disabilities in VA's system.

Question 8: You state in your testimony that VA does not support section 101 of the bill because VA will accept any reasonable in-service stressor as long as it appears consistent with the circumstances of the veteran's service and if the VA examination and other evidence support the decision, establish service-connection on a direct basis. I do not think the VA examination is needed to make this link of service-connection. If all the other conditions are met under section 1154, then according to section 1154, the veteran's injury should be presumed to be service-connected if consistent with the circumstances, conditions or hardships of service notwithstanding the fact that there is no official record of such incurrence or aggravation and can only be rebutted by clear and convincing evidence to the contrary. I took a look at your M–21–1s pertinent to section 1154 and I can only conclude that your interpretation and instructions to your employees conflict with the congressional intent of section 1154. Would you care to provide some insight on the application of the M–21–1s, particularly how even the presence of medals is often not enough to prove combat with the enemy? Would you please define what VA interprets as "engaged in combat with the enemy"? Provide supporting documents if necessary—i.e. general counsel opinions, etc.

Response: First, I would like to clarify that my testimony on section 101 was given with respect to section 101 of a draft bill, not section 101 of H.R. 5892. Section 101 of the draft bill would have added post traumatic stress disorder (PTSD) to the statutory list of diseases that are presumed to have been incurred in or aggravated by service, applicable to any veteran who engaged in combat with the enemy in active service during a period of war, campaign, or expedition and who is diagnosed with PTSD. Section 101 of H.R. 5892 would provide that active duty service in a theater of combat operations during a period of war or in combat against a hostile force during a period of hostilities be considered "combat with the enemy" for purposes of 38 U.S.C. § 1154(b).

The purpose of section 1154(b) is to recognize the hardships and dangers involved with military combat and acknowledge that military recordkeeping during times of combat activity may not be as thorough and complete as recordkeeping done at other less stressful times. As a result, veterans who engaged in combat with the enemy and file claims for service-connected disability related to that combat are not subject to the same evidentiary requirements as non-combat veterans. Thus, a combat veteran may establish the in-service incurrence or aggravation of an injury or disease, for purposes of establishing service connection for a resulting disability, with satisfactory lay or other evidence if consistent with the circumstances, conditions, or hardships of such service. When the claim is based on PTSD, a combat veteran's lay statement alone can establish the occurrence of the claimed in-service stressor that has caused the current symptoms. Nevertheless, to establish entitlement to compensation for a service-connected disability, more must be shown. The in-service incurrence or aggravation of a disease or injury is only one of three elements needed. There must also be medical evidence of a current disability and medical evidence of a nexus between the in-service disease or injury and the current disability. These requirements have been upheld by the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit, both of which agree that section 1154(b) facilitates the proof of only one element needed to establish entitlement to compensation for a service-connected disability.

VA procedures are consistent with this interpretation of section 1154(b). Medical evidence, such as a VA examination, is necessary to show that there is a current diagnosis of the condition for which compensation is sought. In PTSD cases, an examination can establish the presence of current PTSD symptoms and provide the required medical link between the acknowledged in-service stressor and current PTSD symptoms. The examiner must determine whether an in-service stressful event actually caused the current PTSD symptoms. For this reason, as well as to assess the level of disability for compensation purposes, a VA examination may be necessary for service-connected disability compensation.

Furthermore, the procedural manual used by VA to assist employees with processing PTSD claims, the M21–1MR, is consistent with section 1154(b). Although section 1154(b) facilitates the proving of in-service incurrence or aggravation of a combat-related injury or disease for veterans who engaged in combat with the enemy, it does not facilitate proving that a particular veteran did in fact engage in combat with the enemy so as to be able to benefit from section 1154(b). The Court of Appeals for the Federal Circuit has agreed with this interpretation. The manual M21–1MR provides that a veteran's receipt of any of certain listed decorations is evidence

of exposure to combat-related stressors. The manual list includes the Army Combat Infantryman Badge, Combat Medical Badge, Combat Action Badge, Combat Action Ribbon, Purple Heart, Silver Star, Bronze Star Medal with "V" device, and many others. Thus, a recipient of one of these decorations can rely on receipt of the decoration itself to establish the occurrence of an in-service stressor. Medals that are awarded for service in a theater of operations, such as the Vietnam Campaign Medal or Iraq Campaign Medal, are not proof that the recipient personally participated in combat, but may serve as evidence supporting combat status when considered along with other evidence.

If a veteran claims combat status but did not receive one of the listed decorations, VA will conduct research on the veteran's military unit and seek evidence of any combat activity engaged in by the unit during the veteran's service. No claim for disability compensation based on combat status, including those for PTSD, will be denied without first exhausting all avenues of research for evidence of combat. This includes sending an outside request for research to the Army and Joint Services Records Research Center.

Irrespective of whether a veteran establishes that he or she engaged in combat with the enemy, VA requires a medical examination to determine whether the veteran currently has the disability for which he or she filed a claim and whether a link exists between service and the veteran's current disability.

In a precedent opinion issued in 1999, the VA Office of the General Counsel defined "engagement in combat with the enemy" as "participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality." The Court of Appeals for the Federal Circuit sanctioned this definition in *Moran v. Peake*, 525 F.3d 1157, 1159 (Fed. Cir. 2008) ("engaged in combat with the enemy" in section 1154 requires that the veteran have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as determined on a case-by-case basis).

Question 9: Please elaborate on your opposition to section 302 and how this would negatively impact the BVA. Given the most claims to the CVAC begin as pro se wouldn't this provision help these veterans? Be mindful that the genesis of provisions pertaining to section 302 come from statements and testimony presented by attorneys who ultimately end up representing these veterans.

Response: Again, I want to clarify that section 202 of H.R. 5892, which corresponds to section 302 of the draft bill on which VA testified at the April 10, 2008, hearing, differs from section 302. Section 202 would add to the Veterans Court's powers by enabling the court to "vacate and remand" a Board decision. Section 202 would also condition the Veterans Court's power to affirm, modify, reverse, remand, or vacate and remand a Board decision on first deciding all relevant assignments of error raised by the appellant for each particular claim for benefits, except where the Veterans Court reverses a decision on the merits of a claim and awards benefits, in which case the court need not decide any additional assignments of error with respect to that claim. However, section 202 does not include the provision in section 302 of the draft bill that we found most objectionable (prohibiting VA from assigning or conceding an error not raised by the appellant, without first obtaining the appellant's written consent.)

My April 10, 2008, testimony opposing enactment of section 302 did not mention negative impact on the Board. Rather, our concerns focused on the court and VA's role before the court. We believe that requiring the court to decide every allegation of error raised by the appellant would harm rather than help the appellant by unnecessarily delaying the court's decision and eliminating the possibility that an issue could be resolved in the appellant's favor before being decided by the court. We do not see that section 202 would provide any benefit to appellants, including the majority who are unrepresented when they file their appeals with the Veterans Court. Pro se appellants are more likely to raise issues that are not germane to the outcome of their claims, which the Veterans Court would be required to address in the event of a remand and which, as we explain below, would delay final resolution of claim.

As a result of section 202, the Veterans Court would be required to issue longer and more complicated opinions. This would of course contribute to the court's backlog. The Veterans Court's caseload has doubled in the past 10 years, and it takes approximately 14 months to obtain a merits decision on a case. Merits decisions addressing every issue raised on appeal by an appellant would significantly extend the time from filing to disposition by the court, and final resolution of claims would be delayed by court opinions on issues that, in the end, may not affect the outcome of the claims.

Also, when the Veterans Court remands a claim, the underlying Board decision is vacated and the claim is adjudicated anew. If the Veterans Court were required

to decide all issues raised by the appellant, the court may be forced to decide an issue adversely, which the appellant could not then appeal again to the Veterans Court following the Board's decision on remand. However, if the Veterans Court is able to remand the case without resolving the issue, the appellant would be allowed to present additional evidence and argument on remand and might prevail on the issue before the Board.

In addition, Article III of the Constitution limits Federal-court jurisdiction to "Cases" and "Controversies," which means there must be a real and substantial controversy for which there is specific relief that can be provided by a conclusive decree. No justiciable "controversy" exists when parties ask for an advisory opinion, and therefore, Federal courts are without power to issue such opinions. *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) ("At the heart of the 'case or controversy' requirement is the prohibition against advisory opinions."). The Veterans Court has adopted the case-or-controversy limitation with respect to its own power to review Board decisions. Section 202, however, would require the Veterans Court to issue advisory opinions in some cases because section 202 would require the court to decide all issues raised by the appellant, including those that would not exist if further evidence and argument were developed on remand to the Board or those that are frivolous or wholly irrelevant to the case.

Question 10: Can you inform the Committee of the VBA's average cost per initial claim and reopened claims? If not, can you provide this information?

Response: Costs would involve such things as employee hours, examination costs, facilities, supplies, support personnel, and other overhead costs. We do not have the data required to provide these calculations.